

The Office of Administrative Hearings

The Eighth Annual Report

to

Governor Janet Napolitano

Senator Ken Bennett, President of the Senate

Representative Jake Flake, Speaker of the House

Pursuant to A.R.S. § 41-1092.01(C)(5)

and

A.R.S. § 41-1092.01(C)(9)



Cliff J. Vanell, Director

October 31, 2003

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I. Introduction and Overview

The Office of Administrative Hearings (OAH) was created pursuant to Laws 1995, Chapter 251, adding Arizona Revised Statutes § 41-1092 *et seq.*, and commenced operation on January 1, 1996. Administrative hearings previously provided by regulatory agencies (except those specifically exempted) were transferred to the OAH for independent proceedings. There are two OAH locations, Phoenix and Tucson, with 31 full-time positions, including the Director, the Office Manager, 19 Administrative Law Judges, and 10 support staff. In addition to conducting hearings in Phoenix and Tucson, the OAH travels nearly four weeks per month on rotation to Flagstaff, Kingman, Lake Havasu City, Prescott, Show Low, Sierra Vista, and Yuma. Our statutory mandate is to “ensure that the public receives fair and independent administrative hearings.”

Responsibility:

The OAH understands its responsibility to create a system that is efficient and cost effective. The statistics of the OAH in FY 2003 indicate agency acceptance of Administrative Law Judge Decisions without modification was 89.21%. Agency acceptance of Findings of Fact and Conclusions of Law without modification was 94.58%. Rehearings (0.95%) and Appeals (2.74%) were rare. Evaluations by participants continue to indicate that Administrative Law Judges and the OAH were rated excellent or good in 95.64% to 97.38% of responses.

Integrity:

The OAH takes its statutory mandate to provide fair, impartial and independent hearings seriously. Although part of the Executive branch, together with its client agencies, the OAH maintains a conscious detachment from political issues and the missions of the other agencies. Procedures, rulings, and case assignment are at all times kept free of outside pressures to ensure that the parties can be assured that hearings are impartial and independent.

Commitment:

The OAH views commitment as a willingness to advance its mission, including improving the quality of decision-writing. While the Administrative Law Judges must render decisions according to the evidence before them and using their independent judgment, the OAH now requires that Administrative Law Judges review all decisions which have been modified or rejected by an agency in order to encourage them to identify any possible miscites or other areas where quality can be improved. This commitment is in furtherance of the duty of the OAH to provide continuing education to its Administrative Law Judges.

Efficiency:

Through careful case management, the OAH enjoys a minimal backlog. The completion rate for cases in FY 2003 was 102%, despite the loss of two Administrative Law Judges due to budget constraints. Such efficiency was the result of creating two divisions of Administrative Law Judges and refining case management procedures which has maximized calendared hearing slots.

II. Continued Development of the Office

1. Reductions

In FY 2003, the general fund appropriation to the OAH was decreased by 15% from FY 2002 levels. As a result, one Administrative Law Judge position and two staff positions were eliminated.

2. Development of Digital Recording Capability

A.R.S. § 41-1092.07(E) requires that all hearings be electronically recorded. Since 1996, the OAH has used analog technology (traditional tape recording) which was costly in tape replacement and burdensome for storage and retention. Access to hearing records was cumbersome to the judges and parties alike requiring reformatting and the creation of duplicate tapes. Moreover, in the past several years it became apparent that the existing equipment would need to be replaced and such equipment was rapidly being difficult to secure. The OAH researched existing technology and after lengthy experimentation has developed a cost effective digital recording alternative that was fully implemented in early FY 2004. In addition to a better quality recording, the digital files are available through OAH's website for easy downloading by parties and transcribers. The judges are able to retrieve the record easily from their desktops while drafting decisions. The digital files are backed up nightly for reliable retention.

3. Newsletter

The OAH has completed publication of four editions of the OAH Newsletter on a quarterly basis during FY 2003. The Newsletter reports various performance measures and discusses current issues. The Newsletter includes a series of articles written by Administrative Law Judges that include practice pointers. All articles appear on the OAH website, along with the OAH performance measures. Copies of the four editions published in FY 2003 are included in the Appendix.

4. Website

The OAH website was further redesigned and upgraded in FY 2003. The OAH website is designed with the minimum of frills and organized to allow visitors to find information as quickly as possible. The background of the OAH, including its mission statement, logo, management philosophy and views of the hearing rooms give parties a sense of the "feel" of the OAH. The biographies of the Administrative Law Judges allow parties to put a name to a face and learn about a judge's background. Along with links to the Arizona Revised Statutes, Arizona Administrative Code and OAH's procedural rules, the website includes extensive cross referencing to allow non-lawyers to quickly pick up practice pointers and be able to put the law together with a minimum of searching. For example, if a person goes to OAH's procedural rules, any rule which references another rule will have a link to it, as well as any statute in the Uniform Administrative Hearings Procedures Act that deals with the same issue. Likewise, any reference in articles dealing with practice pointers or any response to a frequently asked question that refers to any rule or statute will have links. An average of 2,973 requests were made weekly from the website in FY 2003 from 383 unique domains. The two most visited webpages are the OAH Portal (described below) and articles written by the Administrative Law Judges regarding practice pointers and procedures. All OAH informational brochures included with the Notices of Hearing mailed by the agencies, boards and commissions now include an insert describing the OAH website.

5. OAH Portal

The OAH Portal is an important asset to parties since it allows parties to directly access OAH's docket to view case settings, rulings, receipt of documents and other information. The Portal allows the general public to view all non-confidential cases. Each agency is given a password to view its otherwise non-accessible matters. The digital recordings made in hearings are downloadable from the Portal.

6. Development of Administrative Law Judge Cadres

A.R.S. § 41-1092.01 makes explicit the requirement that the OAH provide technical training to Administrative Law Judges. In addition, A.R.S. § 41-1092.07 created a statutory right to file a nonperemptory motion with the OAH Director to disqualify an Administrative Law Judge for bias, prejudice, personal interest or lack of technical expertise necessary for a particular hearing. In FY 2003, in addition to training, which included State Bar sponsored continuing legal education, privately presented courses, the OAH provided 40 hours of continuing education opportunities to each Administrative Law Judge to ensure professional development.

7. Redevelopment of Case Management

In response to the decrease in general funding for the OAH, two divisions of Administrative Law Judges were created and new case management procedures were implemented to maximize usable calendar hearing slots given a decreased staff.

8. Reconfiguration of Space and Soundproofing of Hearing Rooms

In response to public comment, the OAH created two new large hearing rooms by eliminating wasted hallway space and further soundproofed existing selected hearing rooms. This has resulted in reduced comments about limited space and noise intrusion. In addition, office space no longer required for staff use was converted to a meeting room also used as an overflow hearing room.

9. Contract Hearings for the Board of Fingerprinting

The OAH has entered into an ISA agreement with the Board of Fingerprinting pursuant to A.R.S. § 41-1092.01(J) to conduct its "good cause exception" hearings.

III. Summary of Agency use of OAH Services

1. Case Management

a. Breakdown of Cases Filed by Agency (FY 2003):

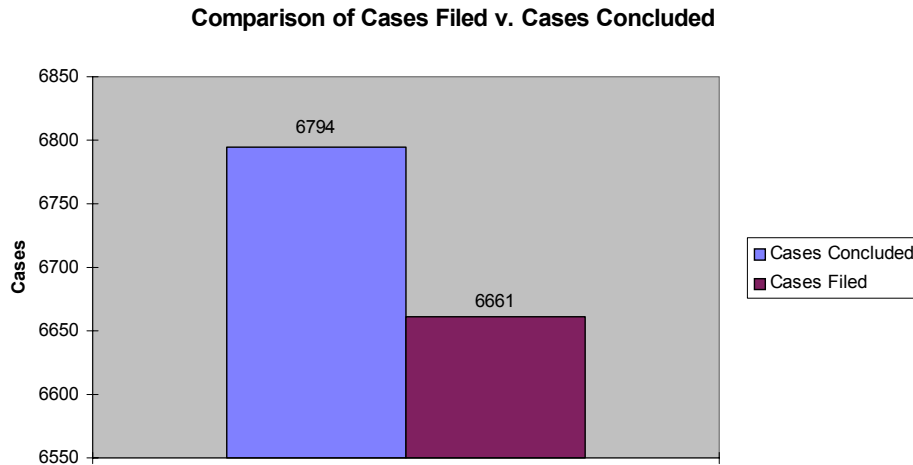
6,661 cases were filed with the OAH in FY 2003. The distribution among the agencies and boards are as follows (in ascending order by number of cases filed):

Administrator for the Arizona Trial Courts, Maricopa County	1
Arizona Board of Athletic Trainers	1
Arizona Lottery	1
Arizona Works-Maximus-(DES)	1
Board of Podiatry Examiners	1
Citizens Clean Elections Commission	1
Department of Administration - Office of Alternative Fuel Recovery	1

Naturopathic Board of Medical Examiners	1
Physical Therapy Examiners	1
Secretary of State - Business Services Division	1
State Board for Charter Schools	1
Veterinary Medical Examining Board	1
Water Quality Appeals Board	1
State Schools for the Deaf and the Blind	2
Board of Behavioral Health Examiners	3
Board of Nursing Care Institution Administrators Examiners	3
Department of Agriculture	3
Board of Chiropractic Examiners	4
Board of Technical Registration	4
Department of Education	6
Peace Officers Standards and Training	7
Board of Dental Examiners	8
Department of Administration	9
Department of Water Resources	9
Secretary of State	9
State Board of Cosmetology	9
Department of Public Safety - Concealed Weapons Permit Unit	10
Office of the Attorney General	11
Department of Gaming	12
State Board of Accountancy	13
Department of Public Safety - Student Transportation	15
State Land Department	16
Structural Pest Control Commission	16
Department of Administration - Capitol Police Parking	17
Board of Appraisal	18
Arizona Medical Board	23
Department of Racing	25
Department of Administration-Capitol Police Parking	34
State Banking Department	43
State Board of Nursing	43
Department of Weights and Measures	51
Board of Fingerprinting	64
Department of Revenue	69
Liquor Licenses and Control	70
Department of Real Estate	72
Department of Building and Fire Safety	109
Department of Insurance	123
Department of Environmental Quality	147
Department of Economic Security - CPS	256
Department of Health Services	331
Registrar of Contractors	1648
Arizona Health Care Cost Containment System	3336

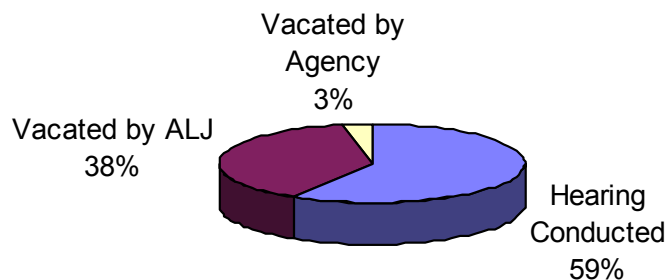
b. Number of Cases Filed versus Cases Concluded

In FY 2003, the conclusion rate, defined as cases concluded divided by new cases filed was 102%.



The following diagram illustrates that, in most cases, matters proceed to hearing. A.R.S. § 41-1092.05 calls for the setting of hearings within 60 days of a request for hearing by an agency in a “contested case” and within 60 days of an appeal of an “appealable agency action.” Although an argument could be made that such timelines inevitably result in unnecessary hearing settings, case management at the OAH discourages cases being “on hold” or riding the calendar. Generally a matter is vacated from the first hearing setting as the result of settlement and does not take up a second hearing setting. Therefore, on the whole, statutory time limits are beneficial to the larger process of regulatory action.

Disposition of Concluded Cases FY 2003

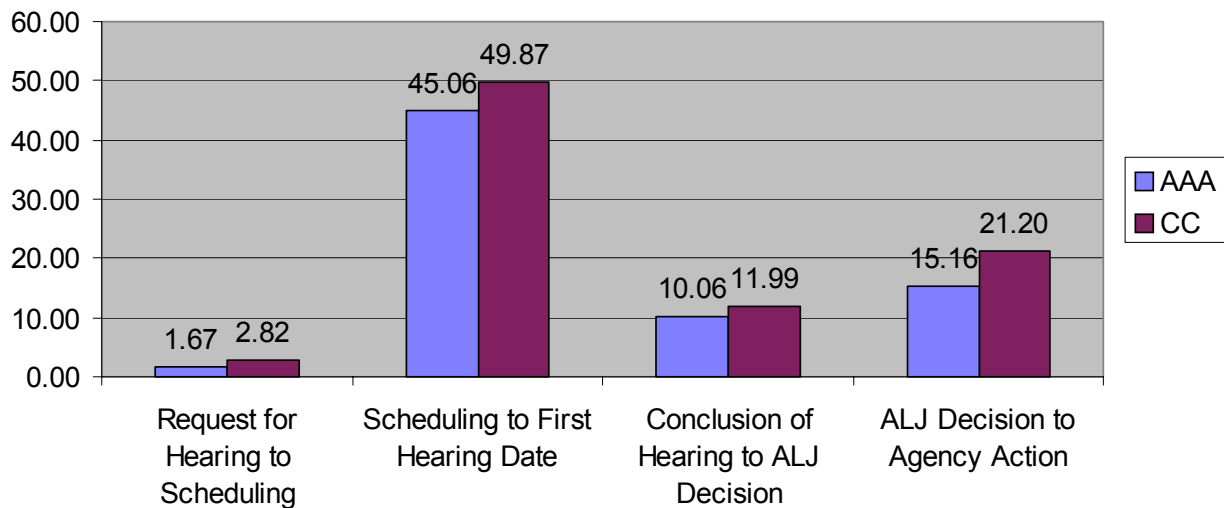


c. Timeline of Case Management:

A.R.S. §41-1092.05(A) and §41-1092.08(A) and (B) contemplate a rigorous timeline to expedite hearings and final agency actions. “Appealable agency actions” (defined as actions taken by an agency without a prior hearing) are required to be set for hearing within 60 days of a request by a party. “Contested cases” (defined as proposed actions for which a hearing is required) are required to be set within 60 days of an agency request. Administrative Law Judge Decisions must be transmitted to the agencies within 20 days of the conclusion of the hearing. The directors and boards are generally required to take final action within 30 days of receipt.

The following diagram illustrates the average timelines:

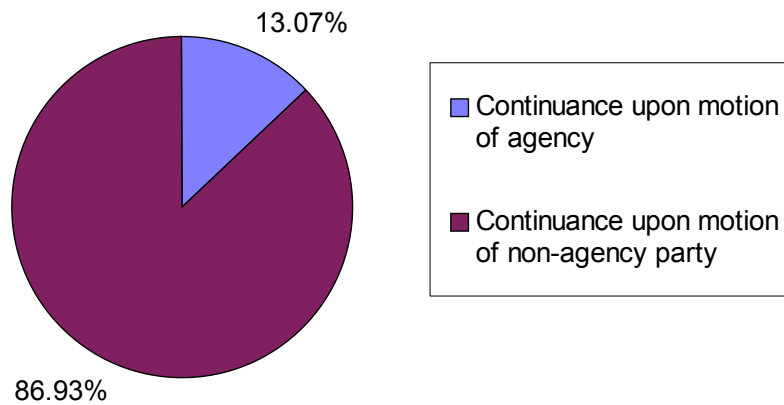
Average Days Between Selected Events - Appealable Agency Actions v. Contested Cases



d. Incidence of Continuance:

A single continuance in FY 2003 added an average of 39.99 days to the length of a case. 62% of all continuance requests were granted in FY 2003. The OAH has developed a well-deserved reputation for discouraging “convenience” continuances in favor of those based on “good cause.” This is especially important because of the decrease in the number of Administrative Law Judges due to budget constraints. The frequency of continuances, defined as the number of continuances granted (675) over the total number of cases first scheduled (7,049), expressed as a percent, was 9.57%. The ratio of first settings (5,712) to continued settings on the calendar (607) was 1 to 0.11. The following chart illustrates the source of continuances.

Comparison of Source of Continuance, FY 2003



Most continuances are on the motion of a non-agency party. The following list is a breakdown of FY 2003 continued settings and their sources, by agency.

AGENCY	Continued - Motion by non- agency party	Continued - Motion by agency party
Arizona Health Care Cost Containment System	210	54
Arizona Lottery	1	-
Arizona Medical Board	3	1
Board of Appraisal	5	-
Board of Chiropractic Examiners	1	-
Board of Dental Examiners	15	-
Board of Podiatry Examiners	1	-
Department of Administration	3	1
Department of Administration - Ofc. Alt. Fuel Recovery	3	-
Department of Administration-Capitol Police Parking	1	-
Department of Building and Fire Safety	10	-
Department of Economic Security - CPS	34	5
Department of Environmental Quality	26	19
Department of Health Services	23	10
Department of Insurance	20	4
Department of Public Safety - Student Transportation	1	-
Department of Racing	1	-
Department of Real Estate	6	-
Department of Revenue	21	-
Department of Revenue - Unclaimed Property	1	-
Department of Water Resources	3	-
Department of Weights and Measures	24	-
Liquor Licenses and Control	17	5
Naturopathic Board of Medical Examiners	1	-
Peace Officers Standards and Training	3	-
Registrar of Contractors	270	5
Secretary of State	3	-

State Banking Department	3	2
State Board of Accountancy	6	-
State board of Charter Schools	-	1
State Board of Nursing	3	-
State Land Department	3	2
State Schools for the Deaf and the Blind	1	-
Structural Pest Control Commission	2	-
TOTAL	725	109

The following chart reflects the number of motions to continue that were entertained and the percentage granted:

	ODC	OGC	Total Motions	% Granted
AHCCCS	214	386	600	64.3
Arizona Lottery	-	6	6	100.0
Arizona Medical Board	5	19	24	79.2
Behavioral Health Examiners	1	-	1	0.0
Board of Chiropractic Examiners	-	1	1	100.0
Board of Dental Examiners	2	3	5	60.0
Department of Administration	1	4	5	80.0
Department of Administration - Parking	2	1	3	33.3
Department of Administration - Alternative Fuels	2	2	4	50.0
Department of Building and Fire Safety	15	13	28	46.4
Department of Economic Security - CPS	29	44	73	60.3
Department of Environmental Quality	26	47	73	64.4
Department of Health Services	27	44	71	62.0
Department of Insurance	18	28	46	60.9
Department of Gaming	-	1	1	100.0
Department of Public Safety-Student Trans	1	2	3	66.66
Department of Racing	3	-	3	0.0
Department of Water Resources	2	6	8	75.0
Department of Weights and Measures	1	61	62	98.4
Department of Public Safety- CWP	2	2	4	50.0
Liquor Licenses and Control	9	34	43	79.1
Naturopathic Board	-	1	1	100.0
Osteopathic Board	1	1	2	50.0
Podiatry	-	1	1	100.0
POST	1	1	2	50.0
Real Estate	12	9	21	42.9
Revenue	10	21	31	67.74
Registrar of Contractors	326	428	754	56.8
Secretary of State - Notary	2	5	7	71.4
State Banking Department	1	3	4	75.0
State Board of Appraisal	2	5	7	71.4
State Board for Charter Schools	-	1	1	100.0
State Board of Accountancy	4	7	11	63.6
State Board of Nursing	8	4	12	33.3
State Land Department	8	12	20	60.0
Structural Pest Control	-	2	2	100.0
Water Quality Appeals Board	4	-	4	0.0
TOTAL	739	1205	1944	62.0

2. Evaluation

a. Results of Public Evaluation:

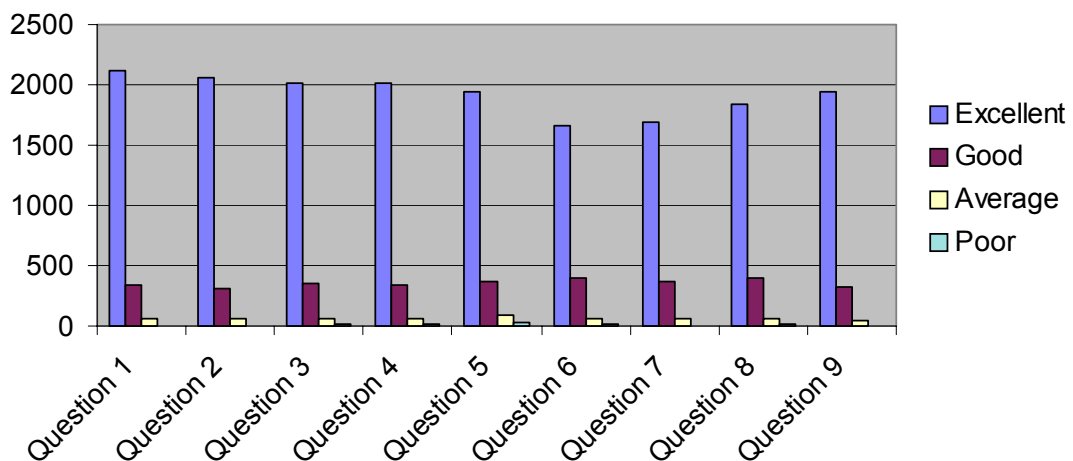
Since November 1996, the OAH has administered an evaluation procedure. At the conclusion of every hearing, evaluations are handed out to four major groups of hearing participants: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The results are not disclosed to the Administrative Law Judge. To make sure that all participants are encouraged to respond, the bailiff provides a copy of the evaluation to parties before the beginning of the hearing. The Administrative Law Judge is required to call the parties' attention to the evaluation on the record.

Those responding are asked to rate the following categories, on a scale of excellent, good, satisfactory, poor:

1. Attentiveness of the Administrative Law Judge
2. Effectiveness in explaining the hearing process
3. Administrative Law Judge's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

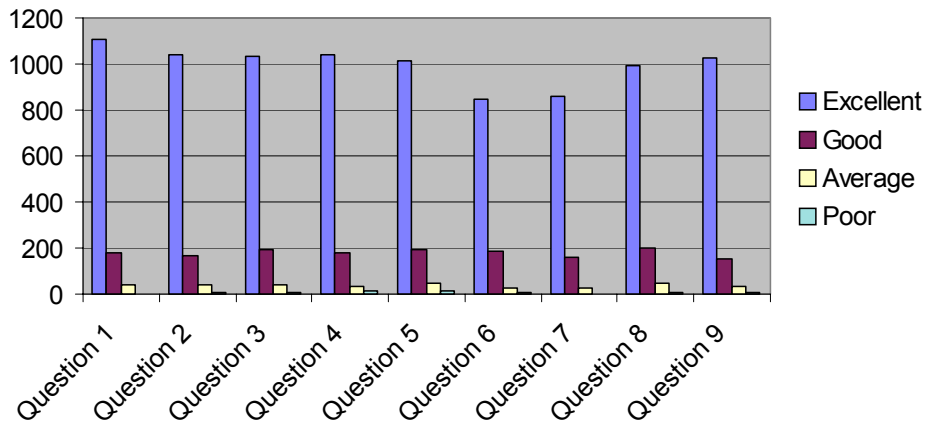
The results indicate that satisfaction is high among all groups, with those responding rating the OAH excellent to good in all categories.

All Responses FY 2003



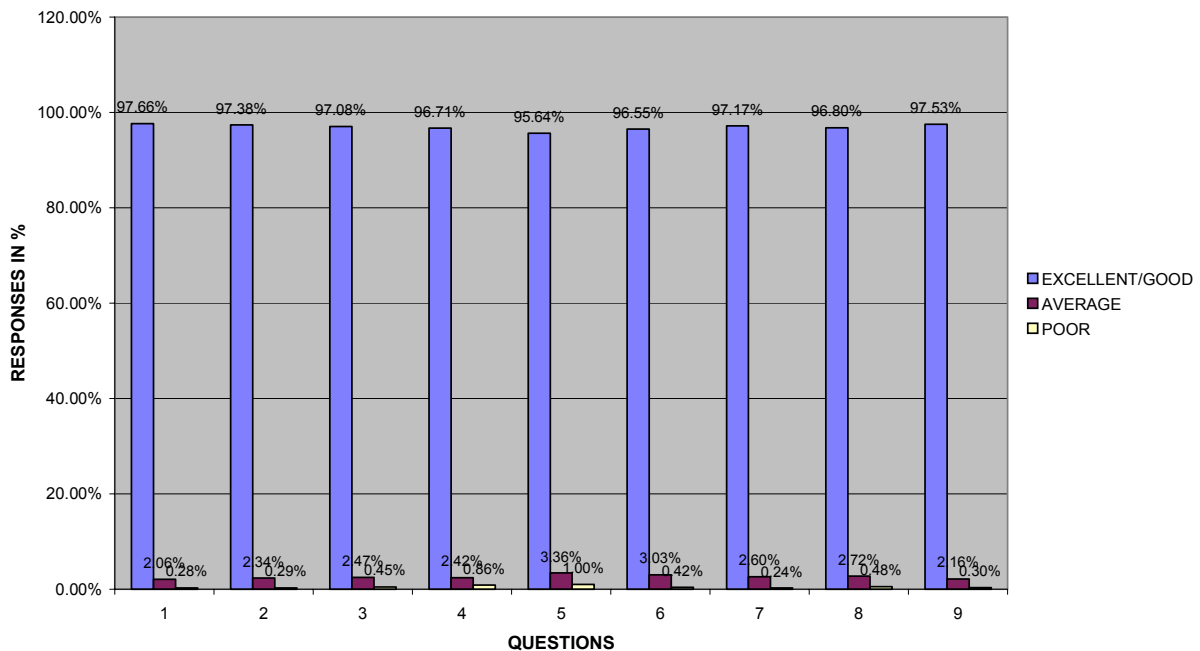
An analysis of the unrepresented parties for a sample quarter indicates that even among this most vulnerable group, the OAH is seen to be functioning extremely well.

Unrepresented Responses FY 2003



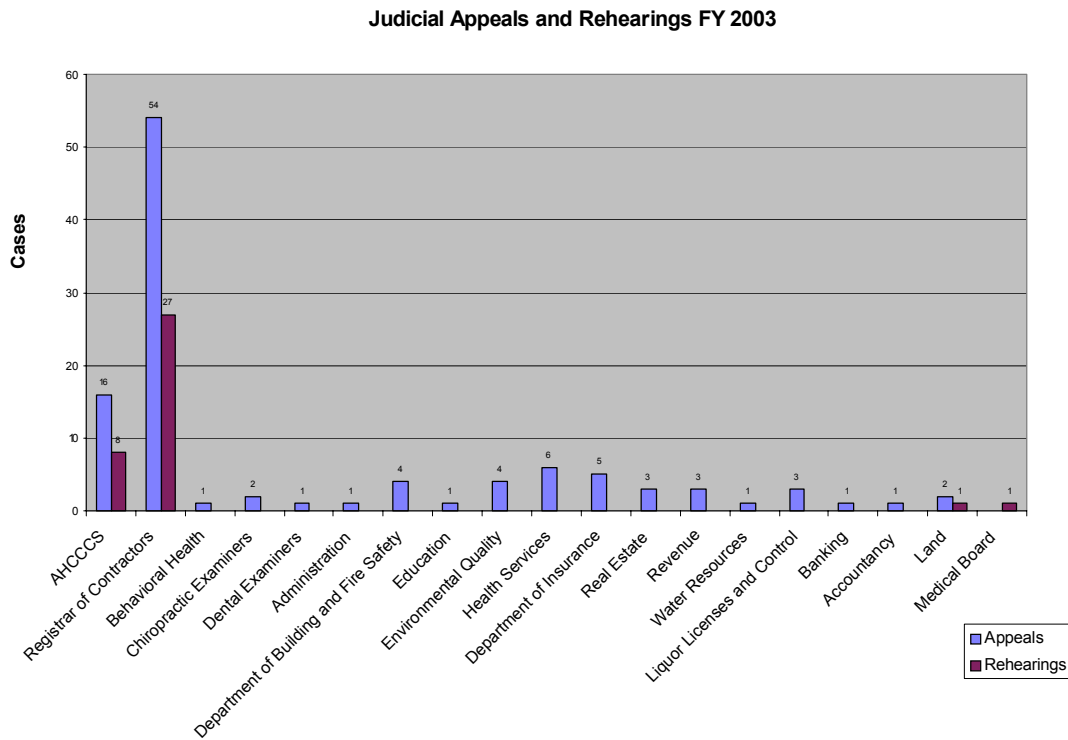
The following diagram illustrates that on average 94.37% to 96.9% of participants evaluating the OAH process responded that the OAH was excellent or good in all categories.

EVALUATIONS FY 2003



b. Incidence of Rehearing and Appeal:

Rehearings are permitted pursuant to A.R.S. § 41-1092.09 under certain conditions. In FY 2003, the rehearing rate (defined as rehearings scheduled divided by cases heard) was .95%. Appeals to Superior Court are provided for pursuant to A.R.S. § 41-1092.08(H). The judicial appeal rate (defined as judicial appeals taken divided by cases heard) was 2.74%. As reflected in the following diagram, rehearings and judicial appeals in FY 2003 were relatively rare. Both were concentrated at the Registrar of Contractors. Registrar of Contractor cases are primarily contests between two private litigants: homeowner versus contractor; contractor versus subcontractor.

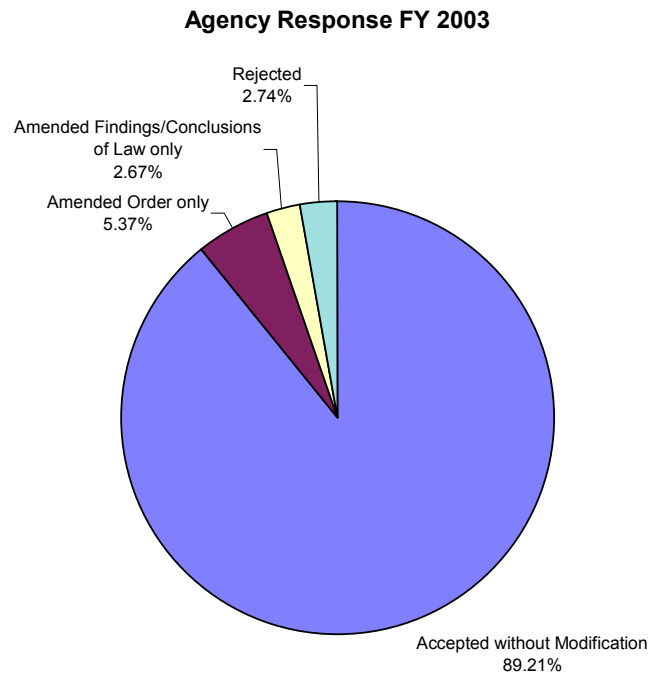


IV. Acceptance of Administrative Law Judge Decisions by Agencies

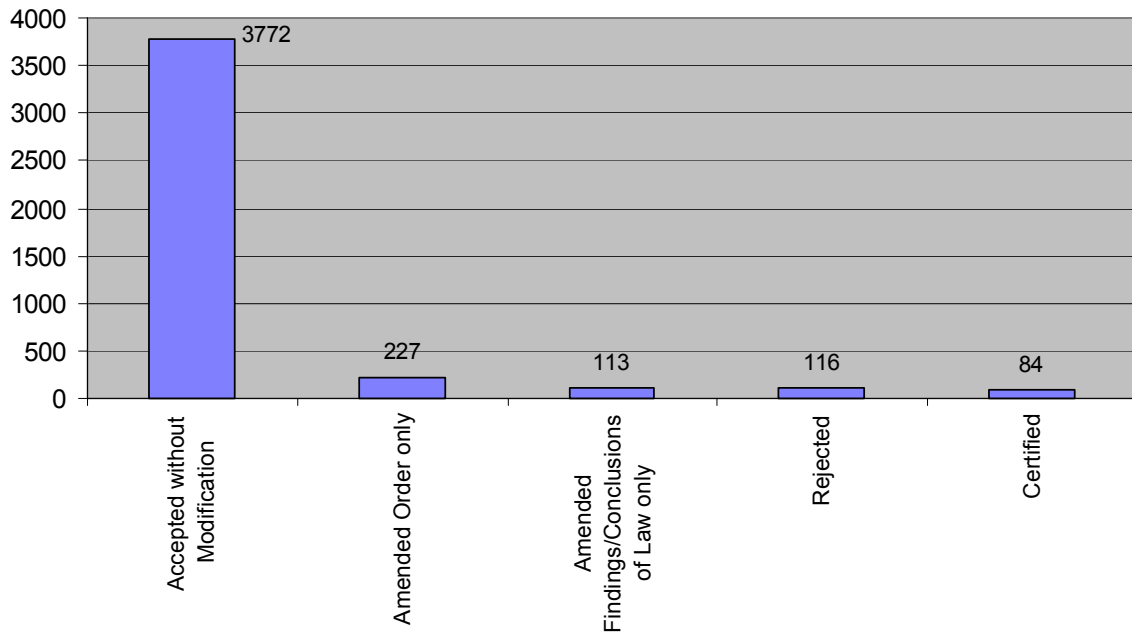
1. Agency Action

Agency acceptance of the Administrative Law Judge Decisions is very high. 89.21% of all decisions acted upon by the agencies are accepted without modification. Agency acceptance was 94.98% if viewed from the vantage point of acceptance of Findings of Fact and Conclusions of

Law, the core function of the Administrative Law Judge. 66.76% of modifications made by the agencies were in the Recommended Order (penalty portion).



The following chart reports the number of cases in the various categories of agency response.



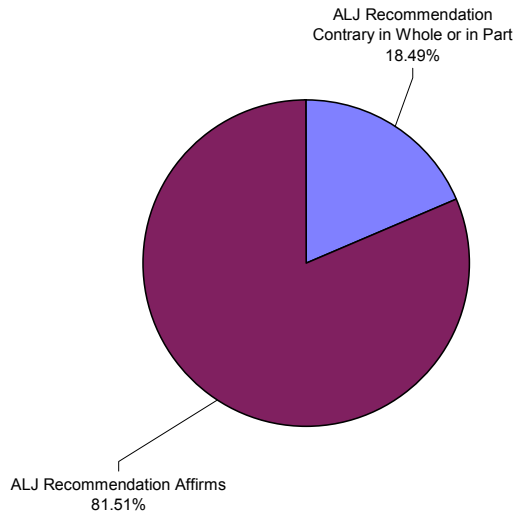
The following chart reports the breakdown by agency. This chart further illustrates that modifications and rejections are few relative to the decisions accepted.

	Accept	Modify Penalty	Modify Fact/law	Reject
Arizona Health Care Cost Containment System	3021	22	10	112 *
Arizona Health Care Cost Containment System	1832	22	82	94
Arizona Lottery	1	-	-	-
Arizona Medical Board	2	4	1	-
Board of Appraisal	1	2	-	-
Board of Behavioral Health Examiners	1	-	-	-
Board of Chiropractic Examiners	5	-	-	-
Board of Dental Examiners	14	1	-	-
Board of Nursing Care Institution Administrators Examiners	1	-	-	-
Board of Technical Registration	1	-	-	-
Citizens Clean Elections Commission	-	-	1	-
Department of Administration	3	1	-	-
Department of Administration - Capitol Police Parking	72	-	-	-
Department of Building and Fire Safety	62	2	-	-
Department of Economic Security - CPS	147	1	11	2
Department of Environmental Quality	42	-	-	2
Department of Gaming	4	-	-	-
Department of Health Services	223	3	5	3
Department of Insurance	67	4	2	2
Department of Public Safety - Concealed Weapons Permit Unit	5	-	-	-
Department of Public Safety - Student Transportation	12	-	-	-
Department of Racing	18	1	-	-
Department of Real Estate	22	4	1	1
Department of Revenue - Unclaimed Property	-	3	-	1
Department of Water Resources	2	-	-	-
Liquor Licenses and Control	25	5	-	-
Peace Officers Standards and Training	3	-	-	-
Physical Therapy Examiners	1	-	-	-
Registrar of Contractors	1154	168	7	10
Secretary of State	3	-	-	-
State Banking Department	5	-	-	-
State Board of Accountancy	5	1	-	-
State Board of Cosmetology	4	2	-	-
State Board of Nursing	21	-	3	-
State Land Department	5	-	-	1
Structural Pest Control Commission	9	3	-	-

* stricken data corrected Nov. 12, 2003

In FY 2003, Administrative Law Judges rendered decisions which were contrary in whole or contrary in part to agencies' original positions in 18.49% of cases. Agency acceptance of contrary decisions was high (75.49%).

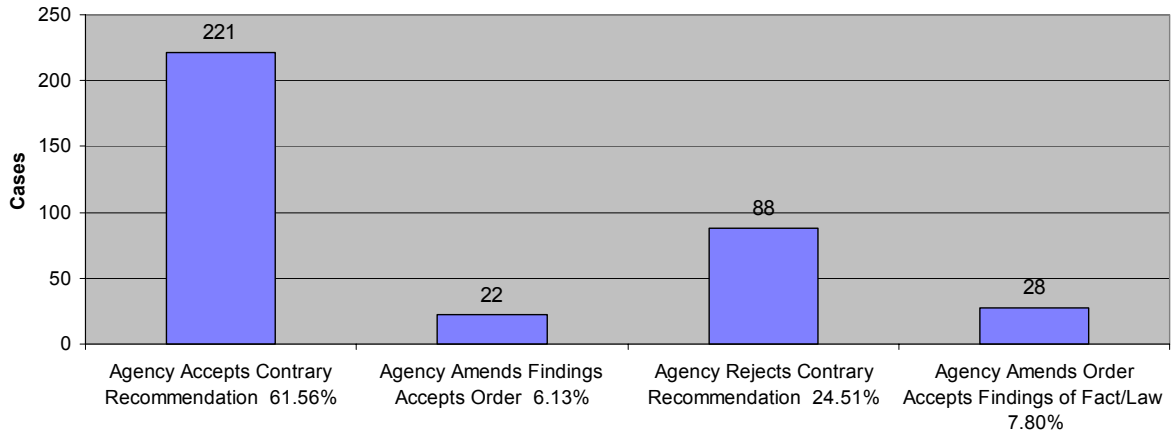
ALJ Decisions Contrary to Original Agency Position FY 2003



The following two charts show a breakdown by agency of its responses to contrary decisions.

	Accepts	Amends Findings/Law	Rejects	Amends Order
AHCCCS	80	10	76	11
Arizona Medical Board	-	1	-	1
Behavioral Health Examiners	-	1	2	-
Board of Chiropractic Examiners	1	-	-	-
Board of Physical Therapy	1	-	-	-
Building and Fire Safety	12	-	-	1
Citizens Clean Elections	-	1	-	-
Department of Insurance	3	1	2	2
Department of Administration	-	-	-	1
Department of Economic Security - CPS	59	5	2	-
Department of Environmental Quality	7	2	2	-
Department of Health Services	8	-	-	-
Department of Racing	6	-	-	-
Department of Real Estate	5	1	1	3
Department of Revenue	-	-	1	3
Liquor Licenses and Control	7	-	-	-
Registrar of Contractors	30	-	1	5
State Banking Department	1	-	-	-
State Land Department	1	-	1	-
Structural Pest Control	-	-	-	1

Agency Response to Contrary Recommendations FY 2003



2. Agency Inaction With Subsequent OAH Certification of Finality

Beginning August 21, 1998, the OAH was required to certify the Administrative Law Judge Decision as the final administrative decision if the OAH has not received the agency, board or commission's action accepting, modifying or rejecting the recommended decision within 30 days of transmission. Special rules apply if the board or commission meets monthly or less frequently. See A.R.S. §41-1092.08(D). In FY 2003, 84 Administrative Law Judge Decisions were certified by the OAH as final administrative decisions.

Structural Pest Control Commission	1
Arizona Health Care Cost Containment System	1
Arizona Works-Maximus-(DES)	1
Department of Building and Fire Safety	1
Office of Alternative Fuel Recovery	1
Department of Water Resources	1
Department of Revenue - Unclaimed Property	1
Secretary of State - Business Services Division	1
Veterinary Medical Examining Board	1
Board of Nursing Care Institution Administrators Examiners	1
Department of Administration	2
Department of Racing	2
Secretary of State	2
Office of Alternative Fuel Recovery	3
Department of Insurance	6
Department of Economic Security - CPS	16
Department of Building and Fire Safety	43

V. Motions for Change of Administrative Law Judge Granted Pursuant to A.R.S. § 41-1092.07

A.R.S. § 41-1092.01(C)(9)(b) requires that the OAH report the number of motions for change of Administrative Law Judge for bias, prejudice, personal interest or lack of necessary expertise which were filed and the number granted. In FY 2003, 16 motions were filed and no motion was granted.

VI. Violations of A.R.S. § 41-1009

Pursuant to A.R.S. § 41-1092.01(C)(9)(c), the OAH reports that it has no knowledge of violations of A.R.S. § 41-1009 by any agency.

VII. Recommendations for Changes in the Administrative Procedures Act

The regulated community has long complained about inconsistent procedures among the various agencies. The following recommendations are meant to point to the areas where uniformity or greater consistency can be accomplished:

1. Expand the right to settlement conferences to include “contested cases.”

A.R.S. §41-1092.03 provides that appellants to “appealable agency actions” be entitled to settlement conferences with an agency representative. No such right exists for “contested cases,” which include most disciplinary proceedings. Such a conference may be beneficial in expediting informal disposition of cases.

2. Establish uniform basis for rehearing.

Parties must research the specific rules of each agency, board or commission to determine the bases for rehearing since there is little uniformity. Standardizing and recapitulating possible bases in Title 41 would make the process easier, particularly for the unrepresented.

3. Establish uniform standards for appeal rights notice.

Currently there are no standards for how, and with what degree of specificity, appeal rights to Superior Court should be communicated to parties once the agency has acted.

4. Conform Rehearing and Appeal Rules.

Currently parties have 30 days from service of an agency’s final action, presumed after 5 days of mailing to the party’s last known address, to request a rehearing under A.R.S. § 41-1092.09(A)(1) and A.R.S. §41-1092.09(C). However, pursuant to A.R.S. § 12-904(A), parties have 35 days to file an appeal to Superior Court upon service, presumed after 5 days of mailing to the party’s last known address. Conforming the time limits for requesting rehearings and filing appeals will simplify the process by eliminating varying time limits

for parties to act on final orders and will allow agencies to frame the effective dates of their final orders to a single date.

5. Recoupment of Costs for Administrative Hearings:

Billed costs to non-General Fund supported agencies, boards and commissions (ISA agencies), pursuant to A.R.S. § 41-1092.01(E) and (K), could be recouped by them by extending the statutory authority found in isolated statutes to all such ISA agencies.

An example of statutory authority for recoupment is found in A.R.S. § 32-128(H) which permits the Board of Technical Registration to recoup certain costs:

H. On its determination that a registrant or a home inspector has violated this chapter or a rule adopted pursuant to this chapter, the board may assess the registrant or the home inspector with its reasonable costs and expenses incurred in conducting the investigation and administrative hearing. All monies collected pursuant to this subsection shall be deposited, pursuant to sections 35-146 and 35-147, in the technical registration fund established by section 32-109 and shall only be used by the board to defray its expenses in connection with disciplinary investigations and hearings. Notwithstanding section 35-143.01, these monies may be spent without legislative appropriation.

To avoid any appearance of impropriety by the ISA agencies, such recoupment might be limited to settlements or to cases where the ISA agency prevails before the independent Administrative Law Judge, or only as incident to disciplinary orders.

VIII. Recommendation for Changes or Improvements in Agency Practice with Respect to the Administrative Procedures Act

Statutory Guidance in Definition of “Physical Injury” under A.R.S. § 8-201

As of June 30, 2003, the OAH has concluded in excess of 1,471 cases under A.R.S. § 8-811. The statutory scheme provides that those who are facing substantiation of reports of child abuse or neglect, and therefore deposit of these reports in the State’s Central Registry for 25 years, be accorded the right to have the State demonstrate “probable cause” before the OAH. Experience has shown that the current scheme is inadequate or uncertain in a key area requiring statutory clarification.

Title 8 does not define “physical injury” as it applies to abuse under A.R.S. § 8-201. One position is that the statute is one of strict liability. Under that viewpoint, any physical injury, if observable, constitutes abuse. This is true regardless of how minimal, or whether it is sustained by a child as a consequence of parental discipline or attempts to control the behavior of a child, or even as the result of accident. Another viewpoint sees the terms, “infliction of or allowing” physical injury

found in A.R.S. § 8-201 as requiring some minimal bad intent, thus allowing reasonable mitigation in cases of manifest accident. Still another position applies the defenses to assault found in A.R.S. § 13-403 to the concept of “physical injury” to recognize some leeway in parental discipline.

In the absence of clear standards, some Administrative Law Judges apply the definition of “physical injury” found in A.R.S. § 13-3623(A)(4), or use it for guidance. These Administrative Law Judges are generally uncomfortable using the Title 13 statute, but at the same time feel obligated to have at least some statutory foundation for their determinations as to when there has been “abuse” as defined in Title 8. In either of these situations, Administrative Law Judges may or may not apply the defenses of A.R.S. § 13-403, depending on whether abuse is considered strict liability. Other Administrative Law Judges, finding the use of the criminal statutes inappropriate, because of lack of notice to the appellant, do not apply either A.R.S. § 13-3623(A)(4) or A.R.S. § 13-403. In many cases physical injury is so manifest, and so obviously the result of intentional unjustified acts, that the lack of definition presents no difficulty. However, many situations which are not obvious cases of abuse can become subjective ad hoc decisions. Likewise, similar facts may be viewed differently by different Administrative Law Judges, resulting in opposing orders.

APPENDIX

Newsletters

The OAH



Jane Dee Hull
Governor

Cliff J. Vanell
Director

Vol. 25
October 2002

www.azoah.com

Official Newsletter of the Arizona Office of Administrative Hearings

WHAT TO PACK FOR YOUR ADMINISTRATIVE HEARING: THE EVIDENCE TO PRESENT

Kay Abramsohn, Administrative Law Judge

Director's note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

When you come to your administrative hearing, you will be asked to present your case. The information you present for your case may be slightly different, depending on the type of case you are involved in. Generally, you are presenting to the Administrative Law Judge (ALJ) your disagreement with a determination that was made against you or the information being used against you. Perhaps you will be presenting your information about problems with the way something was done, why something should be done differently, or why something should now happen or be completed for you. The following descriptions are generally the types of hearings that you may be involved in.

Type 1. You are a licensed individual or company and the regulating agency wants to take some action against your license either because a complaint was filed against you by another person, or because the agency has made some investigation and found some factual information it believes to be important. Generally, you are presenting your disagreement with the agency's action and why it should not happen.

Type 2. You are trying to become licensed or qualified for something or some benefits and the regulating agency has denied your application. Generally, you are presenting an explanation of the information the agency used against you or additional information in your favor which you feel the agency did not, but should, take into account.

Type 3. You are the person who filed the complaint against a licensed person or company and are presenting your version about what has happened. Generally, you are presenting why you think your complaint has merit and what you believe should happen next on your behalf.

Type 4. You are a person against whom an agency has made a determination with which you disagree and want reconsidered. Generally, you are presenting why you disagree, your reasons for your disagreement and the supporting law, facts, documents or witness testimony supporting your position.

In all of these cases you must present information to the ALJ. You may be aware that in the judicial courts

"What to Pack"

continued on page 2

The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative Hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agencies

began in 1945 with California. The current states or cities having adopted the model, with year of inception are: Arizona (1996), California (1961), Colorado (1976), Florida (1974), Georgia (1995), Chicago (1997), Iowa (1986), Kansas (1998), Louisiana (1996), Maine (1992), Maryland (1990), Massachusetts (1974), Michigan (1996), Minnesota (1976), Missouri (1965), New Jersey (1979), New York City (1979), North Carolina (1986), North Dakota (1991), Oregon (1999), South Carolina (1994), South Dakota (1994), Tennessee (1975), Texas (1991), Washington D.C. (1999), Washington (1981), Wisconsin (1978) and Wyoming (1987).

Mission Statement:

We will contribute to the quality of life in the State of Arizona by fairly and impartially hearing the contested matters of our fellow citizens arising out of state regulation.

1st Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **95.51%** of all Administrative Law Judge decisions acted upon by the agencies.* ALJ decisions, including orders, were accepted without modification in **91.74%** of all Administrative Law Judge decisions acted upon by the agencies. **67.39%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were 11 appeals filed in Superior Court.

Rehearings:

The rehearing rate was **1.12%**, defined as rehearings scheduled (10) over hearings concluded (891)**.

Completion Rate:

The completion rate was **103%**, defined as cases completed (1694) over new cases filed (1644).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 1st quarter) was **46.73 days**. The frequency of continuance, defined as the number of continuances granted (242) over the total number of cases first scheduled (1661), expressed as a percent, was **14.57%**. The ratio of first settings (1661) to continued settings on the calendar (208) was **1 to 0.13**.

Dispositions:

Hearings conducted: **53.5%**; vacated prior to hearing: **43.6%**; hearings withdrawn by the agency: **2.9%**.

Contrary Recommendations and Agency Response: 16.87% of Administrative Law Judge decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge decisions was **85.71%**.

*2.26% of Administrative Law Judge decisions were certified as final by the OAH due to agency inaction or rendered moot by settlement.

** Cases which were vacated are not included

“What to Pack”

continued from page 1

Arizona, there are specific and detailed rules of evidence which must be followed, but in this quasi-judicial administrative tribunal, the rules about what evidence may be presented and admitted are more relaxed. The key thing to keep in mind about your presentation is to present the information and documents which are directly relevant to the issues in your case and which would be of assistance to the ALJ in making a determination in the case. The ALJ may deny admission of testimony or documents which are irrelevant or repetitious.

Testimony

You and all witnesses are required to be sworn in and testify under oath. You should be prepared to tell your version of events. You may have kept or made notes or a list of what happened first and next, etc. Do not expect to just read your list into the record. You are there to tell the ALJ your information and to answer questions to the best of your ability and recollection, if the ALJ or the other side has questions for you. Every person who presents testimony at a hearing may be asked questions by the ALJ or by the other side.

If you feel another person can supplement your own testimony with additional, technical or expert information about what happened or about a portion of what happened, you should make sure that person comes with you or attends the hearing to present that information to the ALJ. It is always better to have that person testify in person, rather than bring a letter or affidavit from that person.

Documents

Agencies which send cases over to the OAH for hearing typically provide a certain amount of information so that the ALJ has some background about your case. This may include copies of things you have already provided to the referring agency or to the other side.

All along, you should have kept copies of documents or letters you received from the agency or other side about your case. It will help you present your case if you take the time to put them in chronological order and review them before

the hearing. This will enable you to sort out which documents are the important ones that you want the ALJ to review in making determinations. The ALJ does not know exactly what happened. It is up to you to make sure that you point out or highlight for the ALJ what is important in those documents to review.

If you plan to present a copy of something to the ALJ, you must also have and present a copy to the other side. Do not expect OAH to make copies for you and do not expect the ALJ to take time out from the hearing to make copies for you.

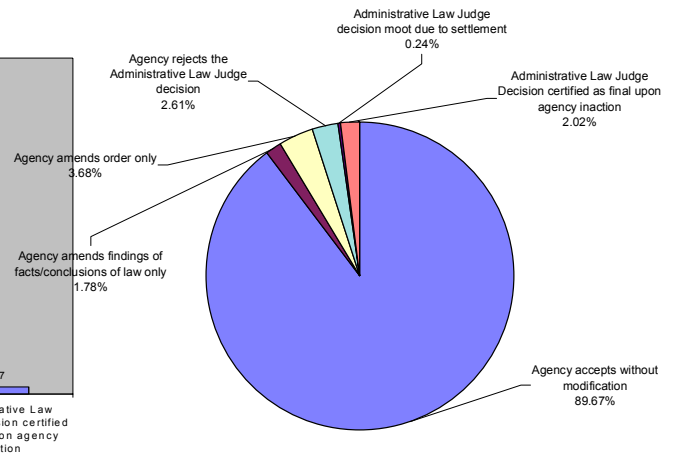
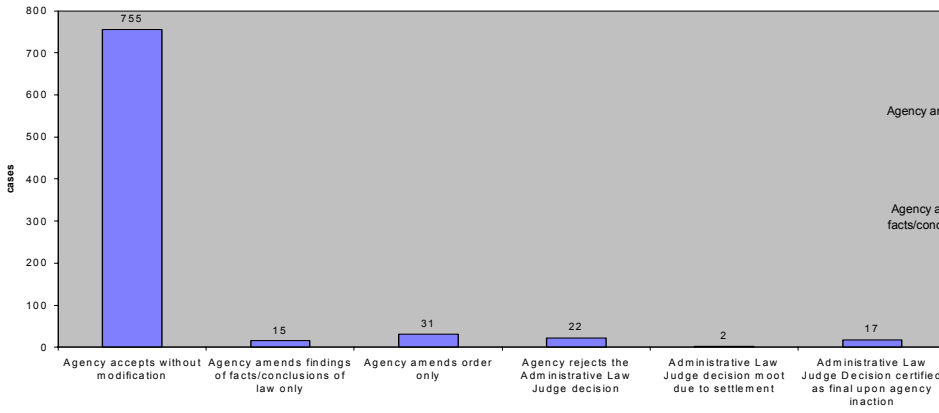
When you ask the ALJ to admit your document into the record, you should tell the ALJ what the document is and why it is important or what it shows. Sometimes the other side objects to the admission of a document. The ALJ will listen to the objection, and often make a decision on his or her own judgment about whether or not to admit the document. If the ALJ asks you for a response, you should tell the ALJ why you believe the document should be considered.

The ALJ will take your document and mark it as an exhibit. These exhibits become and remain a part of the hearing file in your case. After the case is over (no more appeals), you can request in writing that your exhibits be returned. Typically, you come back to the OAH to pick them up after the exhibits are inventoried; you must sign a release form.

Shape and Size

The OAH maintains a hearing case file for your matter. This case file holds standard 8 1/2" by 11" papers. All documentary evidence that you bring to the hearing should ideally fit into that case file or expansion folders which can be maintained with the file. Sometimes you may have a larger item, such as charts, graphs or maps. It is best if these larger items can be folded so they will fit in the case file.

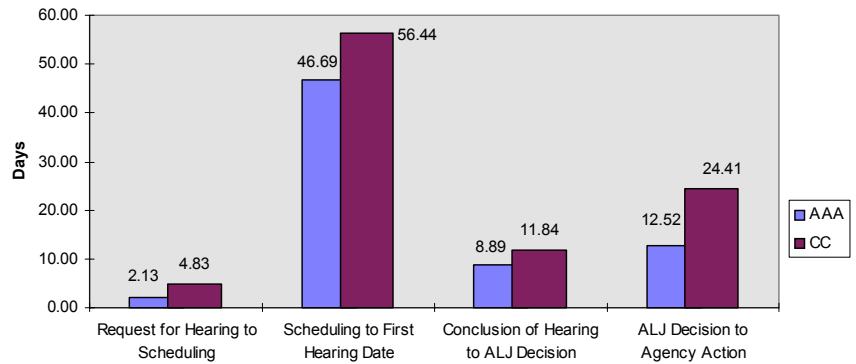
Agency Response to Administrative Law Judge Decisions July 1 - September 30, 2002



Demonstrative Evidence

In certain cases a person may be tempted to bring in large or bulky physical objects or items for the ALJ to review. It is unlikely that this sort of item would be maintained in the administrative hearing case file. Anytime you bring along such an item, you should be prepared to completely describe to the ALJ what the item is and why it is important to review it during the hearing. The ALJ may then make additional comments on the record with regard to his or her observation of such an item and you, rather than the ALJ, will retain that item.

Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, July 1 - September 30, 2002



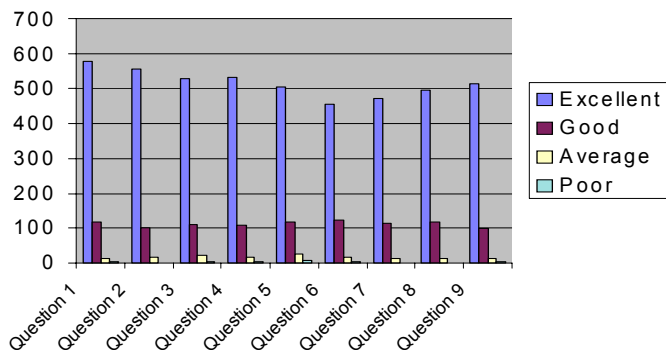
*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

1644 Cases Filed July 1, 2002 - September 30, 2002

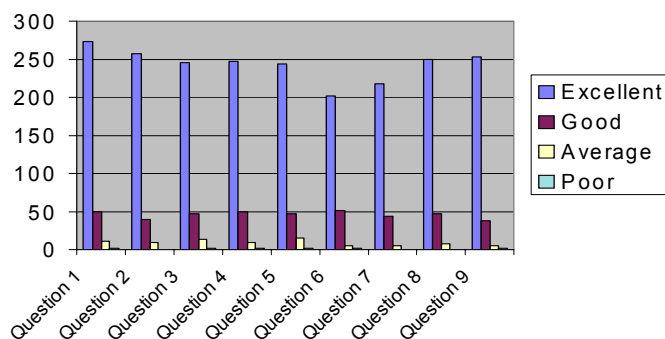
	1st Q	FY 2003		1st Q	FY 2003		1st Q	FY 2003
Accountancy	2	2	Cosmetology	0	0	Parks	0	0
Acupuncture Board	0	0	Dental	2	2	Peace Ofc. Standards	3	3
ADA	0	0	Economic Security	0	0	Pest Control	5	5
Administration	4	4	Economic Security-CPS	68	68	Physical Therapy	0	0
Admin. Parking	49	49	Education	2	2	Podiatry	0	0
Agriculture	0	0	Environ. Quality	30	30	Psychologist Examiners	0	0
Ag. Empl. Rel. Bd.	0	0	Funeral	0	0	Public Safety - CW	2	2
AHCCCS	831	831	Gaming	2	2	Public Safety - Trans	6	6
Alternative Fuel	0	0	Health Services	81	81	Public Safety - Adult CC	0	0
Appraisal	2	2	Insurance	27	27	Pvt. Post. Ed.	0	0
AZ Bd. Occup'l Therapy	0	0	Land	7	7	Racing	1	1
Attorney General	1	1	Liquor	18	18	Radiation Regulatory	0	0
Arizona Works	1	1	Lottery	0	0	Registrar of Contr.	384	384
Banking	10	10	Maricopa Cty. Housing	0	0	Real Estate	20	20
Behavioral Health Ex.	1	1	Medical Board	5	5	Revenue	19	19
Building/Fire Safety	34	34	Naturopathic	1	1	School - Deaf & Blind	1	1
Charter Schools	0	0	Nursing	12	12	Secretary of State	4	4
Chiropractic	0	0	Nursing Care Admin	0	0	Technical Registration	0	0
Clean Elections	0	0	Occupation Therapy	0	0	Water Qual. App. Bd.	0	0
Community Colleges	0	0	Osteopathic	0	0	Water Resources	3	3
						Weights and Measures	6	6

Evaluations of OAH Services

All Responses 1st Quarter



Unrepresented Responses 1st Quarter



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

Note: The four major groups of those who responded are: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The evaluations are filled out immediately after the hearing and the evaluations are not disclosed to the ALJ involved.

Office of Administrative Hearings
 1400 West Washington, Suite 101
 Phoenix, Arizona 85007

The OAH



Janet Napolitano
Governor

Cliff J. Vanell
Director

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Official Newsletter of the Arizona Office of Administrative Hearings

Questioning Witnesses - Reality is the Record

Allen Reed, Administrative Law Judge

Director's note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following article may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

The adversarial hearing or trial process is the currently established legal means (arbitration and mediation aside), for resolving disputes between parties, including disputes with State agencies. The process is often referred to as the search for the truth and is presumed to be more reliable than trial by combat or the dunking stool. Whether the process actually finds what it is seeking, depends on how a case is presented.

Disputes involve a multitude of factual and legal matters. Unless disputed matters involve only legal issues (such as the application of the law or the interpretation of a contract), the factual picture of the events surrounding any legal controversy are generally crucial to a case. These facts may be lost or distorted since the past, unless videotaped, is rarely completely recaptured. Physical facts, whether documents or other tangible items, are not as transitory as events and are, therefore, more susceptible to certainty. Nevertheless, events leading to (as well as tangible matters which may be part of) a dispute depend on the presentation of the testimony of persons having some knowledge about relevant events and conditions.

The facts surrounding any controversy will vary somewhat with each person having any experience with or exposure to those facts. It is generally accepted that persons may observe a neutral phenomenon but subjectively experience different responses, feelings or recollections about the event. It is even more likely that persons who are participants in a situation where they have a personal interest (emotional, financial, or psychological, etc.) will interpret the events differently from participants with conflicting or no interests. These differences often become greater over time. Truth may become very subjective based on selective recollection.

However, in any shared experience, absent delusion or fabrication, the

facts cannot be completely altered. The devil (the dispute or disagreement) will be in the details. The ultimate truth in contested matters brought on for hearing before the OAH is based on the record established at the hearing. If a party fails to prepare or present competent evidence (usually in the form of witness testimony), the record may well reflect a reality which is seriously distorted from the actual state of affairs, but in the mind of the Administrative Law Judge (ALJ), the record will nevertheless constitute the reality of what happened, or of what presently is, for the purpose of making a recommendation in the case.

Although all possibilities connected with the questioning of witnesses cannot be anticipated or discussed in this article, there are some general rules which may prove to be instructive. The following is not all inclusive but should present a framework for the efficient presentation of your case through testimonial evidence. In order to competently question a witness you need to organize your entire case.

Know the issues! Know the specific matter(s) the hearing is about. Identify the disputed matters. One cannot ask relevant and probative questions without fully understanding the issue(s).

Know the law! Know how the law applies to each issue and how the law applies to the entire case.

Prioritize the issues! Differentiate between what is important and what is not. Too often parties expend unnecessary time and energy in trying to make a point about inconsequential matters.

Prioritize your facts! Once you know the issues and the law, you should be able determine what facts are important, what you need to prove (establish as true), and how you are going to prove it.

Questioning Witnesses
(continued page 2)

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The process of unifying the administrative hearings function in OAH-style agencies

began in 1945 with California. The current states or cities having adopted the model, with year of inception are: Arizona (1996), California (1961), Colorado (1976), Florida (1974), Georgia (1995), Chicago (1997), Iowa (1986), Kansas (1998), Louisiana (1996), Maine (1992), Maryland (1990), Massachusetts (1974), Michigan (1996), Minnesota (1976), Missouri (1965), New Jersey (1979), New York City (1979), North Carolina (1986), North Dakota (1991), Oregon (1999), South Carolina (1994), South Dakota (1994), Tennessee (1975), Texas (1991), Washington D.C. (1999), Washington (1981), Wisconsin (1978) and Wyoming (1987).

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2nd Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **96.93%** of all Administrative Law Judge decisions acted upon by the agencies.* ALJ decisions, including orders, were accepted without modification in **93.82%** of all Administrative Law Judge decisions acted upon by the agencies. **77.77%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were 50 appeals filed in Superior Court.

Rehearings:

The rehearing rate was **.32%**, defined as rehearings scheduled (3) over hearings concluded (942).**

Completion Rate:

The completion rate was **102.93%**, defined as cases completed (1615) over new cases filed (1569).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 2nd quarter) was **38 days**. The frequency of continuance, defined as the number of continuances granted (220) over the total number of cases first scheduled (1542), expressed as a percent, was **14.26%**. The ratio of first settings (1578) to continued settings on the calendar (238) was **1 to 0.15**.

Dispositions:

Hearings conducted: **58.3%**; vacated prior to hearing: **38.7%**; hearings withdrawn by the agency: **3.0%**.

Contrary Recommendations and Agency Response:

20% of Administrative Law Judge decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge decisions was **72.0%**

*1.10% of Administrative Law Judge decisions were certified as final by the OAH due to agency inaction or rendered moot by settlement.

** Cases which were vacated are not included.

Because of the relaxed rules of evidence in the administrative setting (see A.R.S. §41-1092.07), evidence must only be substantial, reliable and probative. The questioning of a witness in an administrative hearing is less demanding from a legal perspective and more demanding from a practical perspective. You won't be constrained by technical rules of evidence but you will have to be aware of the potential for a broader range of evidence which may be admitted and considered with the potential for extraneous or irrelevant information being placed into the record. In the latter instance, the ALJ will often request that the evidence be made relevant to the issues. In the administrative hearing, issues concerning evidence are usually more practical (how much weight certain evidence should receive) rather than legal (why evidence should or should not be admitted).

Factors to consider in questioning a witness are numerous. Among them are the type of case. A Seriously Mentally Ill-Behavioral Health case will differ from a Mobile Home Landlord - Tenant case. Who are the parties? A disciplinary case where an agency is represented by an Assistant Attorney General (such as a case arising out of the Arizona Medical Board where the Board is attempting to suspend or revoke a physician's license) will differ from cases involving private parties having the primary interest (such as the typical Registrar of Contractor (ROC) case where a homeowner is complaining about work performed by a contractor). Are attorneys involved in the case? Whether none, one or all the parties are represented by attorneys, will affect the questioning of witnesses. What is the subject matter of the case? Who has the burden of proof? Are you trying to establish the truth of a fact or refute the other side? Who is the witness? What is his or her knowledge about the case? Keep in mind that if you are the person who has the most personal knowledge about the case, you are your most important witness. Technical and esoteric areas will require a certain type of testimony, possibly from an expert. Participants in a hearing will present their respective versions of the facts based on their subjective recall and that of their witnesses. Presumably, there will be conformity between the testimony by a party's witness and a party's position on the facts. There may be exceptions to this since ROC inspectors are not necessarily party witnesses.

One of the first rules of the trial arena is, "Never ask a question to which you don't know the answer." Since the administrative setting has limited discovery tools, the

answers which will be given by adverse witnesses very often cannot be known until a question is asked at hearing, although one should always have some understanding of the other side's case. For administrative purposes, the rule can be modified to state, "Never ask your own witness a question to which you don't know the answer."

This does not mean you may cause your witness to testify less than honestly or truthfully. Nevertheless, proper preparation prior to hearing to determine what the witness knows or does not know and how the witness will testify about those elements which are crucial to your case is essential for the effective presentation of your case. Try to strike a balance between no preparation and over preparation of a witness. Oftentimes when it comes to credibility, there may be little difference between a witness who is too rehearsed causing answers to sound artificial and a witness who is unsure and disorganized in giving answers. Both may result in credibility problems.

Is narrative testimony better than short question and answer? Generally, long narrative questions and answers are not favored. This is because narratives tend to ramble, may be convoluted and confusing, and often contain irrelevant information. When possible, it is best to keep questions to your witnesses simple, direct and succinct in order that the answers are similar. Do not ask multiple questions as a single question because they are confusing and require multiple answers. Make sure the witness lets you finish a question before an answer is given. Make sure you let the witness finish an answer before you ask the next question.

When you question the witness begin with the obvious. What is their name, relationship to the parties, basis for knowledge concerning the matters at issue, and basis or foundation for any special knowledge. This preliminary questioning will set a more comfortable mood for you and the witness as well as laying a foundation for who the witness is and what the witness knows. Don't dwell on it, but address any evident weaknesses in your witness before the other side does (potential bias, memory, lack of direct knowledge, etc.)

Make sure your questions are properly organized so you can convey the message you are trying to convey in an orderly and logical manner. Don't jump from one issue to another and then back again.

Leading questions may be asked of hostile or adverse witnesses. The leading question usually has the answer contained in the question. If properly phrased, it should only require a "yes" or "no" answer, and can make very direct evidentiary points, limiting possible unfavorable evidence which could detract from those points.

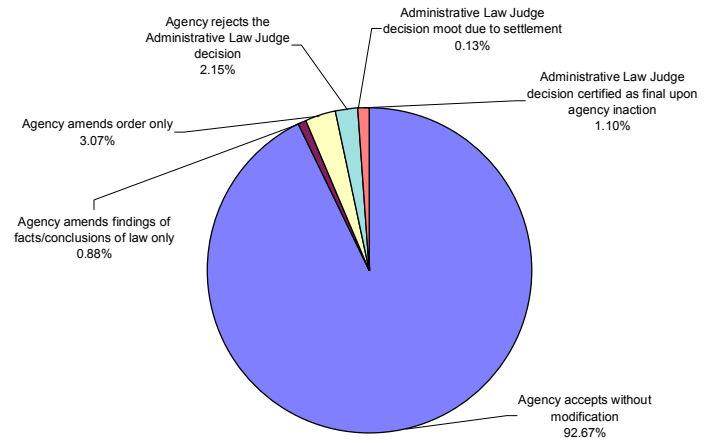
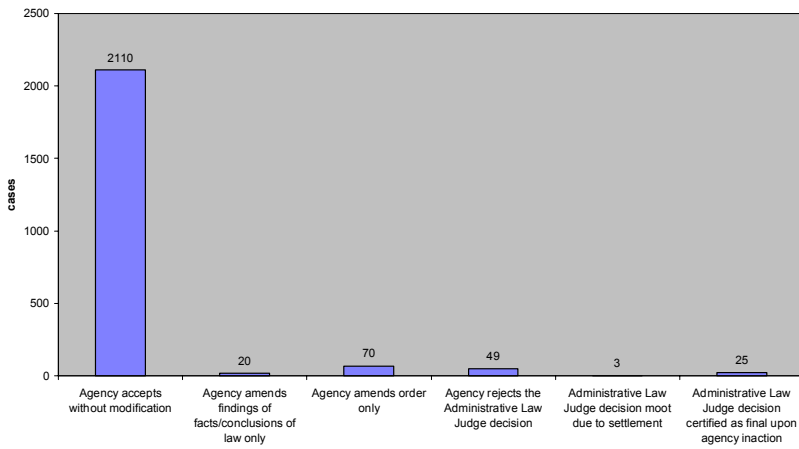
Do not lose your composure or get angry if an adverse witness does not answer the way you want. Impeachment of witnesses may be

Questioning Witnesses

continued from page 1

Know the witness! What does the witness know about the facts and how can you best get that information into the record. Put your witnesses at ease. A nervous witness generally will not testify as effectively as one who is organized and natural.

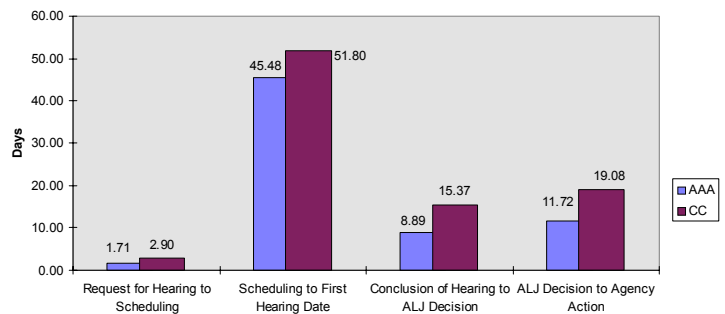
Knowledge of the issues, law, facts, complexity of the subject matter and the ability of the witness to communicate are some of the things that must be considered when determining what questions to ask and how to ask questions of the witness. Remember, you are presenting your story. It should generally consist of a logical and connected sequence of events with a beginning, middle and an end. Questions and answers should convey information in a clear, succinct, non confusing manner. Although an ALJ has experience in listening and separating the "wheat from the chaff", he or she cannot hear what is not said or what is unnecessarily convoluted.



accomplished any number of ways. Impeachment simply means that the truthfulness or accuracy of a person's testimony is suspect for any number of reasons. These can range from a prior felony conviction, or personal bias, or a person's ability to have perceived or recall the events they are testifying about. Does the witness know what she claims to know? How does the witness know? If you cannot impeach the witness, don't continue questioning on the same issue because this often results in the adverse testimony making an even stronger impression than would otherwise be the case. If a witness is testifying based on what someone else told them (generally hearsay), don't spend time attacking the credibility of the witness but rather point out the potential unreliability of the hearsay and its source.

Keep in mind that the Law, especially in the administrative setting, does not need to be mysterious. The Law has little utility in the abstract, save as an intellectual exercise and can only be given substance by its application as a tool for the benefit of people. Your presentation of evidence through the questioning of witnesses needs to follow practical rules based on organization, preparation, reason, and plain common sense.

Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, October 1 - December 31, 2002



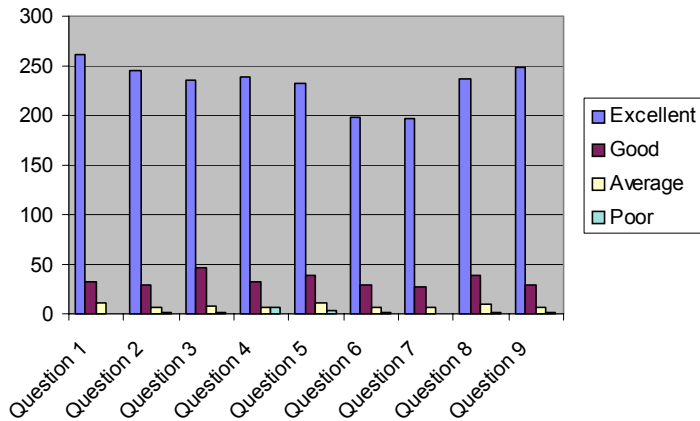
*Note: Appealable Agency Actions are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. Contested Cases involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

1569 Cases Filed October 1, 2002 - December 31, 2002

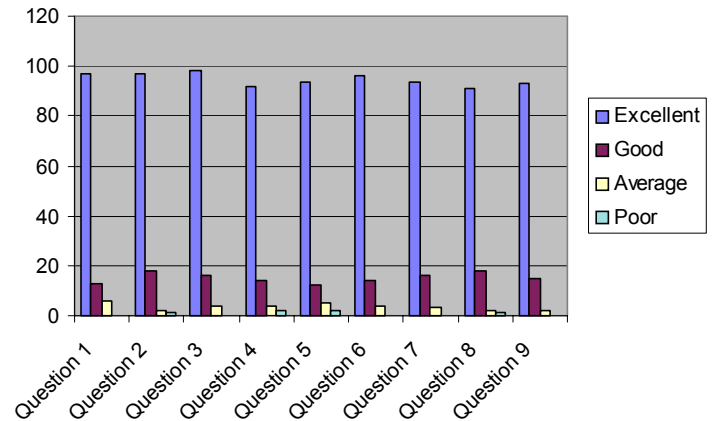
	2nd Q	FY 2003		2nd Q	FY 2003		2nd Q	FY 2003
Accountancy	1	3	Dental	3	5	Pest Control	0	5
Acupuncture Board	0	0	Economic Security	0	0	Physical Therapy	0	0
ADA	0	0	Economic Security-CPS	69	137	Podiatry	0	0
Administration	2	6	Education	3	5	Psychologist Examiners	0	0
Admin. Parking	3	52	Environ. Quality	41	71	Public Safety - CW	0	2
Agriculture	0	0	Funeral	0	0	Public Safety - Trans	2	8
Ag. Empl. Rel. Bd.	0	0	Gaming	1	3	Public Safety - Adult CC	0	0
AHCCCS	670	1531	Health Services	71	151	Pvt. Post. Ed.	0	0
Alternative Fuel	1	1	Insurance	39	66	Racing	11	12
Appraisal	9	11	Land	4	11	Radiation Regulatory	0	0
AZ Bd. Occup'l Therapy	0	0	Liquor	12	30	Registrar of Contr.	475	862
Attorney General	2	3	Lottery	1	1	Real Estate	17	37
Arizona Works	0	1	Maricopa Cty. Housing	0	0	Revenue	11	30
Banking	13	23	Medical Board	6	11	School - Deaf & Blind	0	1
Behavioral Health Ex.	0	1	Naturopathic	0	1	Secretary of State	4	8
Building/Fire Safety	24	57	Nursing	12	24	Technical Registration	2	2
Charter Schools	1	1	Nursing Care Admin	0	0	Veterinary Board	0	1
Chiropractic	3	3	Occupation Therapy	0	0	Water Qual. App. Bd.	0	0
Clean Elections	0	0	Osteopathic	0	0	Water Resources	4	7
Community Colleges	0	0	Parks	0	0	Weights and Measures	14	20
Cosmetology	4	4	Peace Ofc. Standards	2	5			

Evaluations of OAH Services

Unrepresented Responses 2nd Quarter



All Responses 2nd Quarter



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

Note: The four major groups of those who responded are: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The evaluations are filled out immediately after the hearing and the evaluations are not disclosed to the ALJ involved.

Office of Administrative Hearings
 1400 West Washington, Suite 101
 Phoenix, Arizona 85007

The OAH



Janet Napolitano
Governor

Cliff J. Vanell
Director

Vol. 27
April 2003

www.azoah.com

Official Newsletter of the Arizona Office of Administrative Hearings

Director's note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following articles may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

Exclusion of Witness From the Hearing Room

Diane Mihalsky, Administrative Law Judge

Rule R2-19-118 of the Rules for the Office of Administrative Hearings provides that, "[a]t the request of a party, or at the discretion of the administrative law judge, the administrative law judge may exclude witnesses who are not parties from the hearing room so that they cannot hear the testimony of other witnesses." This article briefly discusses the circumstances under which a party may request and the administrative law judge may grant a request to exclude witnesses from the hearing room.

The administrative rule is wholly discretionary, which means that, if a party requests that non-party witnesses be excluded, the administrative law judge is not required to grant the request.¹ Parties' attorneys cannot be excluded from the hearing. Parties may request, or the administrative law judge may order, that witnesses be excluded at any time during the administrative hearing.² If the rule of

"Exclusion"

(continued page 2)

Opening Statements and Closing Arguments

Brian Brendan Tully, Administrative Law Judge

Opening statements and closing arguments delivered during an administrative hearing are not considered evidence by the Administrative Law Judge who conducts the hearing. They are presented by a party, a party's authorized representative, or a party's legal counsel. Such statements are not given under oath or affirmation and are not subject to cross-examination by the opposing party.

Opening Statements

Opening statements are presented prior to the parties presenting their respective cases. Opening statements are an opportunity for the parties to briefly outline their respective presentations to the Administrative Law Judge. Because such statements are not presented under oath or affirmation subject to cross-examination, the opening statement is not the time for a party to explain their entire case. If a party were to do so, that party would be required to repeat the explanation under oath subject to cross-examination in order for the explanation to be considered testimonial evidence.

"Opening and Closing"

(continued page 3)

The Office of Administrative Hearings (OAH) began operations on January 1, 1996. Administrative Hearings previously provided by regulatory agencies (except those specifically exempted) are now transferred to the OAH for independent proceedings. Our statutory mandate is to "ensure that the public receives fair and independent administrative hearings."

The process of unifying the administrative hearings function in OAH-style agen-

cies began in 1945 with California. The current states or cities having adopted the model, with year of inception are: Arizona (1996), California (1961), Colorado (1976), Florida (1974), Georgia (1995), Chicago (1997), Iowa (1986), Kansas (1998), Louisiana (1996), Maine (1992), Maryland (1990), Massachusetts (1974), Michigan (1996), Minnesota (1976), Missouri (1965), New Jersey (1979), New York City (1979), North Carolina (1986), North Dakota (1991), Oregon (1999), South Carolina (1994), South Dakota (1994), Tennessee (1975), Texas (1991), Washington D.C. (1999); Washington (1981), Wisconsin (1978) and Wyoming (1987).

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3rd Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **93.99%** of all Administrative Law Judge decisions acted upon by the agencies.* ALJ decisions, including orders, were accepted without modification in **85.7%** of all Administrative Law Judge decisions acted upon by the agencies. **8.29%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were 27 appeals filed in Superior Court.

Rehearings:

The rehearing rate was **1.77%**, defined as rehearings scheduled (16) over hearings concluded (903)**.

Completion Rate:

The completion rate was **105.35%**, defined as cases completed (1714) over new cases filed (1627).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 3rd quarter) was **37.92 days**. The frequency of continuance, defined as the number of continuances granted (137) over the total number of cases first scheduled (1585), expressed as a percent, was **8.64%**. The ratio of first settings (1599) to continued settings on the calendar (221) was **1 to 0.138**

Dispositions:

Hearings conducted: **60.5%**; vacated prior to hearing: **36.4%**; hearings withdrawn by the agency: **3.1%**.

Contrary Recommendations and Agency Response: 20.22% of Administrative Law Judge decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge decisions was **61.0%**.

*1.43% of Administrative Law Judge decisions were certified as final by the OAH due to agency inaction or were rendered moot by settlement.

** Cases which were vacated are not included.

“Exclusion”

continued from page 1

exclusion is successfully invoked at the start of the hearing, the non-party witnesses will not be allowed to hear the parties' opening statements. The purpose of the rule allowing witnesses to be excluded from the hearing is to prevent witnesses from fabricating facts and to preserve individual witnesses' testimony, which otherwise might be tainted if the witnesses are allowed to hear others' testimony.³ Once a witness has testified and has been cross-examined, he or she may stay to hear the remaining testimony and

closing argument.⁴

Some witnesses lack first-hand knowledge of the events giving rise to the administrative claim or dispute but, instead, are called to testify as an expert about his or her opinion of the significance of facts that other witnesses' testimony establish.⁵ Expert witnesses generally are not subject to exclusion because, although their opinions may be unfounded or unconvincing, opinions are not facts and cannot be true or false.⁶ As a practical matter, if the parties' experts are not allowed to hear and respond to or critique each other's opinions, the hearing may be unduly prolonged as the parties and the administrative law judge attempt to characterize the experts' respective positions. The record also may be compromised if the parties and the administrative law judge inadvertently mischaracterize or inadequately summarize an expert's opinion.

A party may oppose a request to exclude witnesses if the party shows that the witness is essential to the presentation of the party's case.⁷ For example, a party may have retained an investigator or consultant to help it prepare for the hearing.⁸ The purpose of having an investigator or consultant at the hearing is to allow him or her to call the party's attention to factual matters that the party may not be aware of.⁹ A witness's presence also may be essential to the party's case when the witness is also acting as translator for the party or when the party and the witness have a special relationship, for example, husband and wife, parent and child, or therapist and patient,¹⁰ that will facilitate the presentation of evidence and expedite the hearing. But, because the administrative rule is wholly discretionary, the administrative

law judge may find that the witness's presence is less important than the other party's right to invoke the rule and may order that the witness be excluded.

¹ Cf. *Ariz. R. Evid.* 615; *Ariz. R. Cr. P.* 9.3(a) which makes exclusion mandatory.

² See, e.g., *State v. Edwards*, 154 *Ariz.* 8, 13-14, 739 P.2d 1325-26, 1330 (App. 1986).

³ See, e.g., *Edwards*, 154 *Ariz.* at 13, 739 P.2d at 1330.

⁴ See *Ariz. R. Cr. P.* 9.3(a).

⁵ See generally cases interpreting *Ariz. R. Evid.* 702.

⁶ See, e.g., *Burgunder v. State of Arizona*, 55 *Ariz.* 411, 427, 103 P.2d 256 (1940).

⁷ Cf. *Ariz. R. Evid.* 615(3); *Ariz. R. Cr. P.* 9.3(a).

⁸ Cf. *Ariz. R. Evid.* 9.3(d).

⁹ See *State v. Williams*, 182 *Ariz.* 368, 380, 904 P.2d 437, 449 (1995); *State v. Hill*, 174 *Ariz.* 313, 321 n.3, 848 P.2d 1375, 1383 n.3 (1993) (citing comment to Rule 9.3(d)), cert. denied, 510 U.S. 898, 114 S. Ct. 268, 126 L. Ed. 2d 219 (1993).

¹⁰ Cf. *State v. Uriarte*, 194 *Ariz.* 275, 279, 981 P.2d 575, 577 (App. 1999) (interpreting Victims' Bill of Rights).

“Opening and Closing”

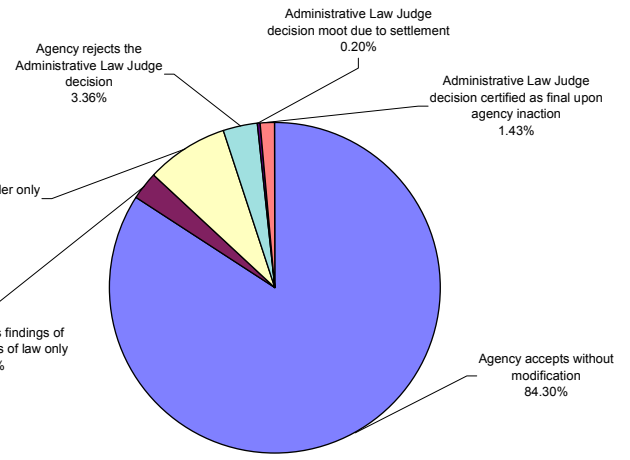
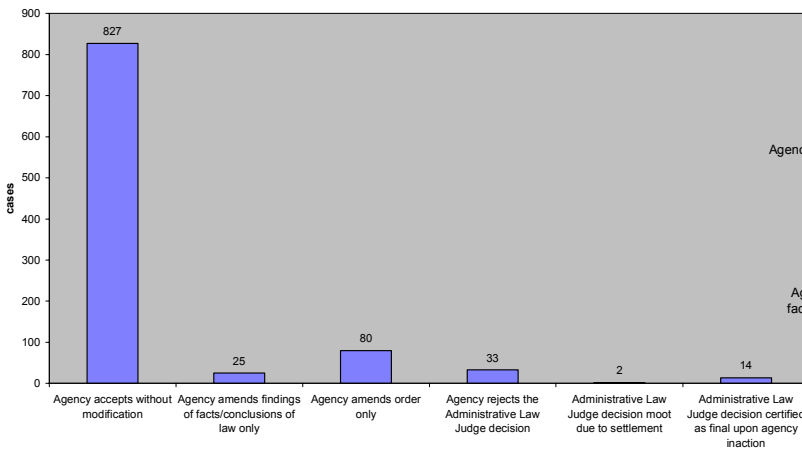
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Closing Arguments

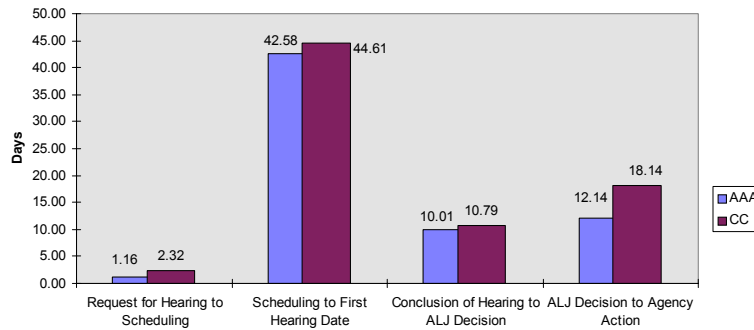
At the conclusion of the parties' presentations, they are afforded an opportunity to present closing arguments. Closing arguments provide an opportunity for the parties to summarize their respective positions and to make recommendations to the tribunal based upon the evidence of record. Generally, the party with the burden of proof delivers the first closing argument. The opposing party then goes next. The party with the burden of proof may, at the discretion of the Administrative Law Judge, be given an opportunity to deliver a final response or reply to an opposing party's closing argument.

After the parties' closing arguments, the hearing is concluded. The Administrative Law Judge will then consider the evidence presented during the hearing in preparing the recommended decision.

Agency Response to Administrative Law Judge Decisions January 1 - March 31, 2003



Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, January 1 - March 31, 2003



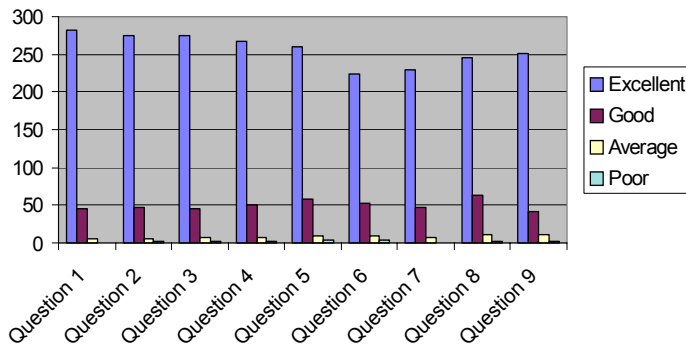
*Note: *Appealable Agency Actions* are agency actions taken before an opportunity for a hearing. A typical example would be the denial of a license. A party is entitled to a hearing before the OAH before the action becomes final. *Contested Cases* involve actions yet to be determined by an agency. An example would be proposed discipline on a professional license with the possibility of suspension or revocation. Parties are entitled to a hearing before the OAH prior to the agency acting.

1627 Cases Filed January 1, 2003 - March 31, 2003

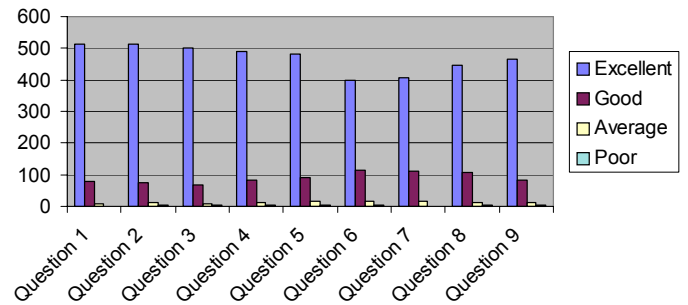
	3rd Q	FY 2003		3rd Q	FY 2003		3rd Q	FY 2003
Accountancy	4	7	Dental	0	5	Pest Control	10	15
Acupuncture Board	0	0	Economic Security	0	1	Physical Therapy	1	1
ADA	0	0	Economic Security-CPS	53	190	Podiatry	0	0
Administration	0	6	Education	0	5	Psychologist Examiners	0	0
Admin. Parking	0	52	Environ. Quality	43	114	Public Safety - CW	3	5
Agriculture	3	2	Funeral	0	0	Public Safety - Trans	3	11
Ag. Empl. Rel. Bd.	0	0	Gaming	5	8	Public Safety - Adult CC	0	0
AHCCCS	850	2378	Health Services	80	231	Pvt. Post. Ed.	0	0
Alternative Fuel	0	1	Insurance	35	101	Racing	5	16
Appraisal	7	18	Land	2	13	Radiation Regulatory	0	0
Attorney General	1	4	Liquor	19	49	Registrar of Contr.	375	1241
Arizona Works	0	0	Lottery	0	1	Real Estate	16	53
Athletic Board	1	1	Maricopa Cty. Housing	0	0	Revenue	27	57
Banking	10	33	Medical Board	5	16	School - Deaf & Blind	0	1
Behavioral Health Ex.	1	2	Naturopathic	0	1	Secretary of State	0	8
Building/Fire Safety	29	86	Nursing	10	34	Technical Registration	0	2
Charter Schools	0	1	Nursing Care Admin	3	3	Veterinary Board	0	1
Chiropractic	1	4	Occupation Therapy	0	0	Water Qual. App. Bd.	1	1
Clean Elections	1	1	Osteopathic	0	0	Water Resources	0	7
Community Colleges	0	0	Parks	0	0	Weights and Measures	20	40
Cosmetology	3	7	Peace Ofc. Standards	1	6			

Evaluations of OAH Services

Unrepresented Responses 3rd Quarter



All Responses 3rd Quarter



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
7. Freedom from distractions
8. Questions responded to promptly and completely
9. Treated courteously

Note: The four major groups of those who responded are: represented private party; unrepresented private party; counsel for a private party; and counsel for the agency. The evaluations are filled out immediately after the hearing and the evaluations are not disclosed to the ALJ involved.

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The OAH



Janet Napolitano
Governor

Cliff J. Vanell
Director

Vol. 28
July 2003

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Official Newsletter of the Arizona Office of Administrative Hearings

Motions to Continue

Director's note: OAH is committed to fairness and making hearings accessible to all. This article is part of a series of informational articles to educate the public and parties who appear before us about the hearing process and how to better present their cases. The following articles may be found at OAH's website at www.azoah.com along with all previous articles published in the OAH Newsletter.

One of the most common motions filed with the Office of Administrative Hearings is the motion to continue (postpone) a hearing. Motions to continue are also, for a variety of reasons, one of the motions most frequently denied. The following article aims to assist parties and practitioners in determining when a motion to continue can or should be filed, and offers practice pointers that may help provide a better understanding generally of motion practice before the Office of Administrative Hearings.

Motions to continue in the Office of Administrative Hearings are governed by both statute and rule. Arizona Revised Statutes ("A.R.S.") § 41-1092.05(C), the governing statute, provides as follows: "The date of the scheduled hearing may be advanced or delayed on the agreement of the parties or on a showing of good cause." By way of supplement to A.R.S. § 41-1092.05(C), Arizona Administrative Code ("A.A.C.") R2-19-110 identifies the factors to be considered when ruling on a motion to continue as including (1) the time remaining between the filing of the motion and the hearing date,

Daniel G. Martin, Administrative Law Judge

(2) the position of other parties, (3) the reasons for expediting the hearing or for the unavailability of the party, representative, or counsel on the date of the scheduled hearing, (4) whether testimony of an unavailable witness can be taken telephonically or by deposition, and (5) the status of settlement negotiations.

Another rule that frequently bears on the filing of a motion to continue is A.A.C. R2-19-106, which governs the filing of motions generally. This rule requires that all motions be filed with the Office of Administrative Hearings not later than fifteen days prior to the scheduled hearing date, unless good cause is shown for the untimely filing.

As can be seen from the foregoing, the first determination the Administrative Law Judge will make upon the receipt of a motion to continue is whether the motion is timely. If the motion is untimely (filed less than 15 days prior to the hearing), the Administrative Law Judge must determine if good cause exists to excuse the untimely filing. Parties and practitioners often neglect to address this threshold question, and as a result may have their motion to continue denied on this basis alone.

"Motions to Continue"
(continued page 2)

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The process of unifying the administrative hearings function in OAH-style agencies

began in 1945 with California. The current states or cities having adopted the model, with year of inception are: Arizona (1996); California (1961); Colorado (1976); Florida (1974); Georgia (1995); Chicago (1997); Iowa (1986); Kansas (1998); Louisiana (1996); Maine (1992); Maryland (1990); Massachusetts (1974); Michigan (1996); Minnesota (1976); Missouri (1965); New Jersey (1979); New York City (1979); North Carolina (1986); North Dakota (1991); Oregon (1999); South Carolina (1994); South Dakota (1994); Tennessee (1975); Texas (1991); Washington D.C. (1999); Washington (1981); Wisconsin (1978); and Wyoming (1987).

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4th Quarter Statistics At A Glance

Acceptance Rate:

ALJ findings of fact and conclusions of law were accepted in **90.8%** of all Administrative Law Judge decisions acted upon by the agencies.* ALJ decisions, including orders, were accepted without modification in **85.86%** of all Administrative Law Judge decisions acted upon by the agencies. **45.36%** of all agency modification was of the order only (i.e. penalty assessed).

Appeals to Superior Court:

There were 36 appeals filed in Superior Court.

Rehearings:

The rehearing rate was **1.06%**, defined as rehearings scheduled (9) over hearings concluded (846)**.

Completion Rate:

The completion rate was **94.64%**, defined as cases completed (1713) over new cases filed (1810).

Continuance:

The average length of a first time continuance based on a sample of cases (first hearing setting and first continuance both occurred in the 4th quarter) was **33.98 days**. The frequency of continuance, defined as the number of continuances granted (194) over the total number of cases first scheduled (1860), expressed as a percent, was **10.43%**. The ratio of first settings (1712) to continued settings on the calendar (155) was **1 to 0.0905**

Dispositions:

Hearings conducted: **61.2%**; vacated prior to hearing: **35.8%**; hearings withdrawn by the agency: **3.0%**.

Contrary Recommendations and Agency Response: 15.31%

of Administrative Law Judge decisions were contrary to the original agency action where the agency took a position. Agency acceptance of contrary Administrative Law Judge decisions was **72.73%**.

*3.02% of Administrative Law Judge decisions were certified as final by the OAH due to agency inaction or were rendered moot by settlement.

** Cases which were vacated are not included.

The term "good cause" is not subject to rigid definition, and in all cases the determination as to whether good cause has been shown ultimately rests in the discretion of the Administrative Law Judge assigned to hear the case. However, the parties may assist the Administrative Law Judge (and themselves) in a number of ways that may affect the decision on whether a continuance will be granted.

First, all motions to continue should be supported by specific details that support the request (in some cases, it may be appropriate for a party to file an affidavit in support of the motion). While this principle may seem self-evident, parties often fail to inform the Administrative Law Judge as to the specific reasons why they are requesting a continuance. In the absence of such reasons, the Administrative Law Judge may conclude that good cause for continuance has not been shown, and deny the motion. Further, as a general rule, a party does not demonstrate good cause for continuance by merely stating that he or she will not be available on the scheduled hearing date. If

a party (or witness) is unavailable, the reasons for such unavailability should be clearly identified. Finally, if the Administrative Law Judge concludes that a party or a party's attorney has created a conflict with a scheduled hearing date (such as by scheduling a vacation or trip or accepting representation with knowledge that a conflict exists), the Administrative Law Judge may deny the motion on that basis.

Second, motions to continue should, as a general rule, state the position of the opposing party. Although agreement between the parties does not guarantee that a continuance will be granted, it is a factor that will be considered by the Administrative Law Judge. Further, if the

motion is filed close to the hearing date, a statement as to the position of the opposing party often will facilitate a prompt ruling on the motion. Under A.A.C. R2-19-106(D), the opposing party has five business days within which to file a response (ten business days if the motion is served by mail). Thus, if the motion is filed close to the hearing date, and the Administrative Law Judge is not informed as to the position of the opposing party, the moving party may not receive a ruling until a date very close to the hearing date or at the hearing itself.

Third, parties requesting continuances should advise the Administrative Law Judge as to the amount of time they are requesting and, if at all possible, the dates on which they (and their witnesses, if applicable) are available for continued hearing.

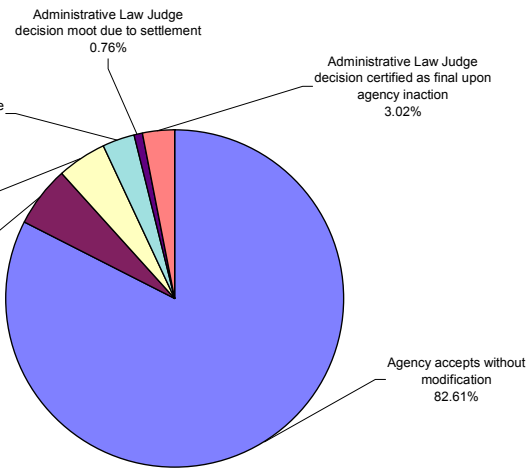
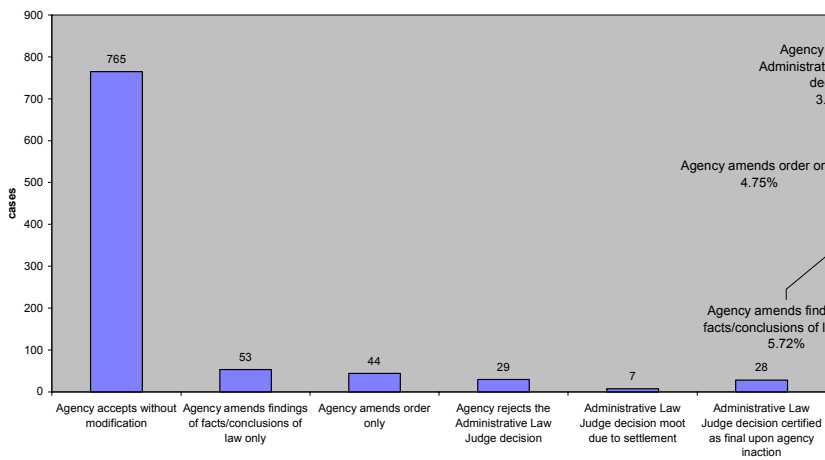
Fourth, parties should always consider acceleration as an alternative to continuance. The Office of Administrative Hearings calendar is very busy, and although the Office of Administrative Hearings endeavors to re-set cases as promptly as possible, thirty to forty-five day delays are not uncommon (the average length of a first time continuance between April 1, 2003 and June 30, 2003 was 33.98 days). By accelerating a case, the parties are able to bring their dispute to hearing faster and thereby have that dispute resolved more expeditiously.

Fifth, if the basis for the request is that a party or a witness is unable to travel to the Office of Administrative Hearings on the scheduled hearing date, the party should consider requesting to appear telephonically as an alternative (see A.A.C. R2-19-114).

One frequently-cited reason for continuance is the existence of a parallel civil proceeding. As a general rule, the Office of Administrative Hearings does not permit cases to remain on the calendar indefinitely pending the outcome of the civil proceeding, and parties should therefore be prepared to proceed with the administrative proceeding simultaneously with the civil proceeding.

"Motions to Continue" continued from page 1

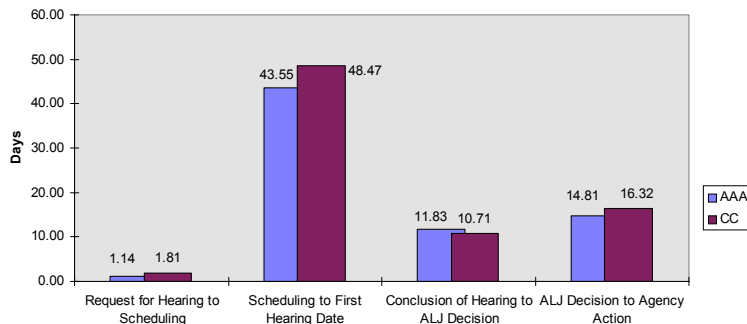
If the motion is timely (or good cause has been shown for an untimely filing), the next determination the Administrative Law Judge will make is whether good cause exists to grant the motion. The burden to demonstrate good cause rests on the moving party. The fact that the parties are in agreement that the hearing should be continued does not in and of itself constitute good cause, and parties should not assume that a stipulated motion will be granted. Even if the parties agree that the hearing should be continued, a showing of good cause still must be made.



Conclusion

The Office of Administrative Hearings recognizes that in many instances, continuances are appropriate or even necessary. However, it is up to the moving party to demonstrate that good cause for continuance exists. Parties can assist themselves and the Administrative Law Judge assigned to their case by filing timely motions that clearly explain why a continuance is necessary. By the same token, continuances are not guaranteed, and no party should assume that a request has been granted until receiving a ruling from the assigned Administrative Law Judge.

Average Time Between Selected Events - Appealable Agency Actions v. Contested Cases*, April 1 - June 30, 2003



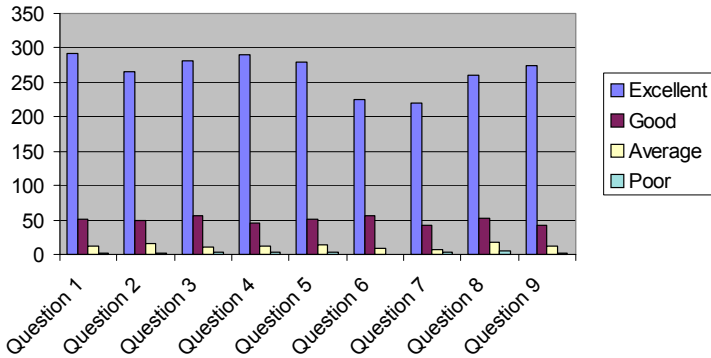
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1810 Cases Filed April 1, 2003 - June 30, 2003

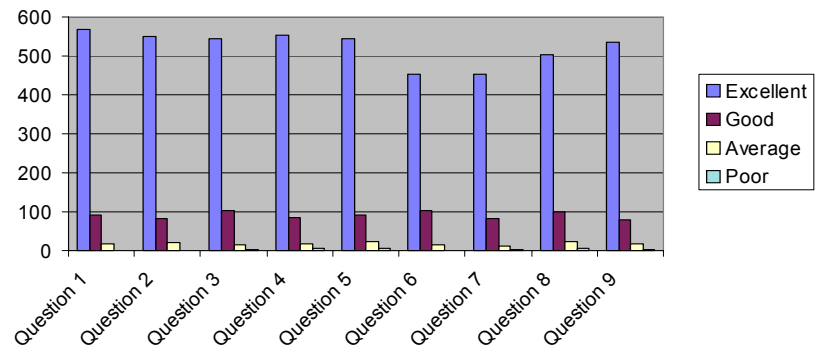
	4th Q	FY 2003		4th Q	FY 2003		4th Q	FY 2003
Accountancy	6	13	Dental	3	8	Pest Control	1	16
Acupuncture Board	0	0	Economic Security	0	0	Physical Therapy	0	1
ADA	0	0	Economic Security-CPS	66	256	Podiatry	1	1
Administration	3	9	Education	1	6	Psychologist Examiners	0	0
Admin. Parking	0	52	Environ. Quality	32	146	Public Safety - CW	0	0
Agriculture	1	3	Fingerprinting	10	10	Public Safety - Trans	4	15
Ag. Empl. Rel. Bd.	0	0	Funeral	0	0	Public Safety - Adult CC	5	10
AHCCCS	953	3331	Gaming	4	12	Pvt. Post. Ed.	0	0
Alternative Fuel	0	1	Health Services	100	331	Racing	8	24
Appraisal	0	18	Insurance	22	123	Radiation Regulatory	0	0
Arizona Trial Courts	0	1	Land	3	16	Registrar of Contr.	404	1646
Attorney General	7	11	Liquor	21	70	Real Estate	18	71
Arizona Works	0	1	Lottery	0	1	Revenue	12	69
Athletic Board	0	1	Maricopa Cty. Housing	0	0	School - Deaf & Blind	1	2
Banking	10	43	Medical Board	7	23	Secretary of State	2	10
Behavioral Health Ex.	1	3	Naturopathic	0	1	Technical Registration	2	4
Building/Fire Safety	23	109	Nursing	9	43	Veterinary Board	0	1
Charter Schools	0	1	Nursing Care Admin.	0	3	Water Qual. App. Bd.	0	1
Chiropractic	0	4	Occupation Therapy	0	0	Water Resources	2	9
Clean Elections	0	1	Osteopathic	0	0	Weights and Measures	11	51
Community Colleges	0	0	Parks	0	0			
Cosmetology	2	9	Peace Ofc. Standards	1	7			

Evaluations of OAH Services

Unrepresented Responses 4th Quarter



All Responses 4th Quarter



Questions:

1. Attentiveness of ALJ
2. Effectiveness in explaining the hearing process
3. ALJ's use of clear and neutral language
4. Impartiality
5. Effectiveness in dealing with the issues of the case
6. Sufficient space
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